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No. _____

IN THE

Supreme Court of the United States

October Term, 1986

NEW MEXICO TAXATION
AND REVENUE DEPARTMENT,
Petitioner,

v.

RAMAH NAVAJO SCHOOL BOARD, INC.
AND
LEMBKE CONSTRUCTION COMPANY, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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QUESTIONS PRESENTED

In *Ramah Navajo School Board v. Bureau of Revenue of New Mexico,* 458 U.S. 832 (1982), this Court ruled that the imposition of New Mexico's gross receipts tax upon the receipts of a non-Indian construction company building a school on an Indian reservation for the Ramah Navajo School Board was preempted because imposition of the tax interfered with comprehensive federal policies and programs providing for the education of Indian children. Upon remand, the School Board was awarded attorney's fees under the Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988. The New Mexico Court of Appeals affirmed the award of attorney's fees on the grounds that the School Board's successful tax refund litigation in this Court was cognizable as a suit brought pursuant to 42 U.S.C. § 1983. The questions presented are:

1. Did the court of appeals err in concluding that the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* created a substantive right in the Ramah Navajo School Board to be immune from the economic effect of a tax imposed upon the School Board's construction contractor, which the School Board enforced pursuant to 42 U.S.C. § 1983?

2. Did the court of appeals err in concluding that imposition of New Mexico's tax upon the School Board's construction contractor violated the Self-Determination Act in the context of 42 U.S.C. § 1983 where this Court did not find that imposition of New Mexico's tax directly violated any provision of the Self-Determination Act but the Act was merely evidence of comprehensive federal interest resulting in preemption of the tax under the Supremacy Clause?

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LEMBKE CONSTRUCTION COMPANY, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

OPINIONS BELOW

The opinion of the New Mexico Court of Appeals is reported at ____N.M.____, 720 P.2d 1243, and is printed in Appendix A. The New Mexico Supreme Court granted a writ of certiorari to review this opinion on February 12, 1986, Appendix B, and quashed the writ of certiorari on June 3, 1986, in an order without opinion, reported at ____N.M.____, 718 P.2d 1349, which is printed in Appendix C. The Order of the District

Court for Santa Fe County, which was affirmed by the New Mexico Court of Appeals, is unreported and is printed in Appendix D.

JURISDICTION

The opinion of the New Mexico Court of Appeals was entered on January 7, 1986. The New Mexico Supreme Court granted a writ of certiorari to review the opinion of the New Mexico Court of Appeals on February 12, 1986 but quashed the writ of certiorari on June 3, 1986. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction in invoked under 28 U.S.C. § 1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article VI, § 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C. § 1983 (excerpt):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

> injured in an action at law, suit in equity, or other proper proceeding or redress.

42 U.S.C. § 1988 (excerpt):

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The relevant portions of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450-450n, and § 452-458e, Public Law 93-638, January 4, 1975, 88 Stat. 2203-2217 are reproduced in Appendix E.

STATEMENT OF THE CASE

This case presents the issue of whether the Ramah Navajo School Board and Lembke Construction Company (hereinafter collectively referred to as the School Board) are entitled to attorney's fees for their successful litigation of a state tax refund suit on the theory that the tax refund suit stated a cause of action under 42 U.S.C. § 1983.

In 1978, the School Board filed suit in the District Court of Santa Fe County against the New Mexico Bureau of Revenue, now the Taxation and Revenue Department (hereinafter the Tax Department) seeking a refund of gross receipts taxes paid by Lembke on receipts from its contract with the School Board for construction of a school on the Navajo Indian Reservation. The School Board alleged as federal grounds[1] for

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[1] There were also state grounds for invalidating the tax which are not relevant here because the School Board did not prevail on these grounds for purposes of an award of attorney's fees under 42 U.S.C. § 1988.

invalidating the state tax that the tax constituted an interference with Navajo self-government in violation of the Treaty of 1868 and federal laws, and that the Supremacy Clause, U.S. Constitution Art. VI, § 2, barred the tax because it interfered with federal policies and programs for the education of Indians.

The School Board's claim for refund was denied by the district court and by the New Mexico Court of Appeals, *Ramah Navajo School Board v. Bureau of Revenue,* 95 N.M. 708, 625 P.2d 1225 (1980), *cert. denied,* 96 N.M. 17, 627 P.2d 412 (1981). The School Board ultimately prevailed on appeal to the United States Supreme Court where the Court ruled that imposition of New Mexico's tax was preempted by the federal policies and programs providing for the education of Indian children. *Ramah Navajo School Board v. Bureau of Revenue,* 458 U.S. 832 (1982). After remand to the state court and refund of the taxes, the School Board filed a motion for award of attorney's fees under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, (hereinafter Section 1988) upon the theory that it had prevailed in an action which was cognizable under 42 U.S.C. § 1983 (hereinafter Section 1983). The Tax Department opposed the motion for attorney's fees on three grounds:

1. The complaint did not state a cause of action which was cognizable under Section 1983 because neither the Supremacy Clause nor the federal statutes concerning Indian education confer rights which are enforceable under Section 1983;

2. The case was never litigated as a case under Section 1983; and

3. The complaint was legally insufficient to state a Section 1983 cause of action because the Tax Department was not a "person" capable of being sued under Section 1983.

The district court ruled that the School Board's litigation was an action authorized and prosecuted pursuant to Section 1983 and that the Tax Department was a person within the meaning of Section 1983. It therefore awarded the School Board its Section 1988 attorney's fees. Appendix D.

The Tax Department appealed from the district court's judgment to the New Mexico Court of Appeals, contesting the award of attorney's fees on the same grounds raised in the district court. The Court of Appeals affirmed the award of attorney's fees, ruling that the School Board had prevailed in an action to enforce Section 1983.[2] The court of appeals' holding rested on two conclusions of law. First, the court concluded that the Supremacy Clause, standing alone, does not confer substantive rights which can be enforced pursuant to Section 1983. The court next concluded, however, that the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.*, confers a substantive right on Indian tribes to coordinate the education of Indian children and, by implication, that Act confers a right to be immune from state taxation, which is enforceable in an action brought pursuant to Section 1983. 720 P.2d 1243 at 1252-1256, Appendix A.

The Tax Department petitioned the New Mexico Supreme Court for a writ of certiorari to review the decision of the Court of Appeals. The writ of certiorari was granted, Appendix B, but was subsequently quashed without opinion as having been improvidently granted. Appendix C.

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[2] The court of appeals also ruled that the School Board's Complaint sufficiently pled a Section 1983 cause of action and that the Tax Department is a person subject to suit under Section 1983, but these conclusions were based on state court rules of pleading and on the interpretation of a state statute. Because those issues were decided on state grounds, they are not presented by this Petition.

REASONS FOR GRANTING THE WRIT

I. **This case presents an important issue of federal law which should be settled by this Court. Can a state violate a federal statute, giving rise to a Section 1983 action, where the state action does not contravene any express provision of the statute and the statute merely evidences comprehensive federal interest which pre-empts state action through the Supremacy Clause?**

The New Mexico Court of Appeals ruled that by enacting the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.*, (hereinafter the Self-Determination Act) that Congress "granted to the Indians the right to coordinate the education of their children" and "[b]y implication, Congress also granted the tribes an immunity from state taxation." *Ramah*, 720 P.2d at 1254. It ruled that the state had violated that right and immunity by taxing the School Board's contractor and thus the School Board's tax litigation could be characterized as a suit brought pursuant to Section 1983 to enforce rights and immunities secured by federal statute. Because the School Board had prevailed in a Section 1983 case, it was entitled to be awarded its attorney's fees under Section 1988.[3] *Id.* at 1256.

The court concluded that the Self-Determination Act created a right to a tax immunity enforceable under Section 1983 without making any finding that there was an actual conflict

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[3] The only reason that inquiry was made into whether the School Board's tax litigation was cognizable as an action brought pursuant to Section 1983 was for purposes of determining whether the School Board was entitled to attorney's fees under Section 1988. The School Board's tax refund suit was brought in district court in New Mexico pursuant to New Mexico statutes authorizing suit against the state for a tax refund and the School Board's Complaint made no mention of Section 1983.

between the state tax and the explicit provisions of the Self-Determination Act. The court could find no such conflict because the Act is silent as to state taxation and contains no provisions which imposition of the state tax directly contavenes. In fact, the Act was relevant to this litigation only as evidence of the extensive federal involvement in Indian education which this Court ruled occupied the field and thus preempted New Mexico's tax. *Ramah,* 458 U.S. at 841-842.

If the New Mexico Court of Appeals' ruling that New Mexico's tax on the School Board's contractor "violated" the Self-Determination Act for purposes of Section 1983 is correct, then every lawsuit which challenges a state's exercise of jurisdiction over on-reservation activity can be characterized as an action brought pursuant to Section 1983, for which Section 1988 attorney's fees may be awarded. This is because the general right of the Indian tribes to self-determination is recognized in the Self-Determination Act, *see* 25 U.S.C. § 450a, and the right to self-determination figures in every lawsuit challenging state jurisdiction over activity which affects Indians. The right to self-government or self-determination provides a "back-drop" against which federal statutes and policies are measured for their preemptive effect on state action, and additionally, it can provide an independent barrier to state regulatory activity. *Ramah,* 458 U.S. at 838.

Indeed, the ramifications of the court of appeals decision go far beyond encompassing all state-tribal litigation. If a federal statute need do nothing more than express general federal policy sufficient to occupy a field to the exclusion of state regulation, then every federal statute that indirectly preempts state activity confers rights which are enforceable against states under Section 1983, even though there is no direct violation of the statute by the state. Thus, this case presents significant issues of federal law: what kinds of federal statutes confer rights which are enforceable against state infringement, and what

must the nature of that infringement be to be cognizable as a Section 1983 action?

These questions take on added significance because they implicate issues of comity between state and federal governments. To what extent did Congress intend to provide a private cause of action under Section 1983 to remedy an alleged state violation of federal statutes and to what extent must those federal statutes directly prohibit the state activity for there to be a violation which is actionable under Section 1983?

The type of statutory violation actionable under Section 1983 is an issue that has received considerable attention from this Court in recent years. Because this Court's decisions first expanded the types of statutory violations previously considered to be actionable under Section 1983 and then limited the effect of the expansion, considerable confusion clouds the issue concerning the character of statutory violations which are actionable under Section 1983.

Prior to *Maine v. Thiboutot,* 448 U.S. 1 (1980), it was generally believed that the only statutory rights enforceable by Section 1983 were those stemming from federal statutes providing for equal rights of all citizens or persons. In *Thiboutot,* however, this Court ruled that the language of Section 1983 creating a cause of action for the violation of the laws of the United States was not limited to enforcement of laws providing for civil rights or equal protection, but covered all federal statutes. *Id.* at 5. The following term, however, the scope of *Thiboutot* was sharply limited in *Middlesex County Sewerage Authority v. National Sea Clammers, et al.,* 453 U.S. 1 (1981) and *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1 (1981).

Sea Clammers held that a Section 1983 remedy does not lie for violation of a federal statute where it can be inferred that Congress intended to foreclose private enforcement under

Section 1983 by providing comprehensive remedies within the statute itself. 453 U.S. at 21. *Pennhurst* stands for the proposition that Section 1983 only provides a cause of action to enforce the violation of federal statutes which confer "substantive " rights. 451 U.S. at 28. In *Pennhurst,* developmentally disabled residents of a state hospital sued to compel the hospital to provide appropriate treatment under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010. This Court interpreted Section 6010 as establishing a national policy to provide better care and treatment to developmentally disabled persons and creating funding incentives for states to do so. This Court concluded, however, that Section 6010 did no more than that, and the Court reversed the lower court decision that the statute conferred enforceable rights on the mentally disabled which may be enforced against states receiving federal funding under Section 6010. *Id.* at 32.

The court below held that a federal statute, in this case the Self-Determination Act, which declares general federal policy, confers substantive rights which are actionable under Section 1983. Far from declaring any rights against the state, however, the Self-Determination Act merely declares the federal government's obligations to Indians in the area of education and the federal government's policy of encouraging Indian control of Indian education. It is obvious from the language of the Self-Determination Act that the obligations imposed are upon the federal government, not the states. Surely, if the statute construed in *Pennhurst,* which specifically enumerates rights of the mentally disabled and provides funding to encourage states to provide better treatment does not create enforceable rights against states under Section 1983, then the broad declarations of federal policy in the Self-Determination Act which do not directly implicate states fall even shorter in creating substantive rights enforceable against states under Section 1983.

Although *Pennhurst* provides compelling precedent that the Self-Determination Act does not confer substantive rights enforceable through Section 1983, the New Mexico Court of Appeals attempted to distinguish *Pennhurst* on the basis that it involved a federal statute creating a federal grant program to states. The court of appeals attributed the result in *Pennhurst* entirely to this Court's concern that interpreting federal grant programs as conferring substantive rights enforceable through Section 1983 may impair the viability of those federal grant programs. *Ramah,* 720 P.2d 1253-1254. Because the Self-Determination Act is not such a federal/state grant program, the court of appeals declined to apply the reasoning of *Pennhurst* to the circumstances of this case.

Because of the New Mexico court's refusal to heed *Pennhurst* and because of the danger that other courts may similarly be misled, this Court should grant the Writ of Certiorari to review the important issue of the scope of *Pennhurst.* Although it is now clear from this Court's decisions in *Pennhurst* and *Sea Clammers* that not every federal statute confers rights which are enforceable against state infringement in the context of Section 1983, the character and nature of federal statutory rights which are actionable under Section 1983 remain unclear. As one commentator has noted:

> Since 1981, the Supreme Court has offered little guidance as to the status and continuing vitality of *Thiboutot* . . . . It has been left to the lower courts to harmonize the *Thiboutot–Pennhurst–Sea Clammers* triad. The result has been a crazy quilt of inconsistent decisions in which one can find support for virtually any proposition about statutory claims under section 1983.

Brown, *Whither Thiboutot? Section 1983, Private Enforcement, and the Damages Dilemma,* 33 DePaul L. Rev. 31, 32-33 (1984).

This Court should grant the Writ of Certiorari in this case to clarify whether federal statutes, such as the Indian Self-Determination Act, which do not directly apply to states, confer substantive rights which can be secured against state infringement in actions brought pursuant to Section 1983.

2. The opinion of the New Mexico Court of Appeals directly conflicts with the decision of a federal Court of Appeals.

The decision of the New Mexico Court of Appeals is in direct and irreconcilable conflict with the opinion in *White Mountain Apache Tribe v. Williams,* No. 81-5348 (9th Cir., Aug. 20, 1986). ("*White Mountain*").[4] The issue presented in *White Mountain* is identical to the issue presented in this case: whether a tribal entity, which prevails on a claim that comprehensive federal regulation preempts state taxation of non-Indian activity occurring on the reservation, has prevailed upon a cause of action which is cognizable under Section 1983, for which attorney's fees may be awarded under Section 1988.

In *White Mountain,* the Ninth Circuit denied an award of Section 1988 attorney fees to the tribe based upon its conclusion that the tribe's litigation could not properly be characterized as a Section 1983 cause of action. The court premised its ruling upon the fact that the White Mountain Apache Tribe had prevailed in the Supreme Court on the basis of general federal premption of state law under the Supremacy Clause and not on the basis that the state tax violated a specific federal statute.

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[4] The August 20, 1986 Slip Opinion is an Amended Opinion, issued following the denial of a Motion for Rehearing and rejection of a suggestion for rehearing *en banc*, which were filed by the White Mountain Apache Tribe following the court's previous opinion issued December 19, 1985. For the convenience of the Court, the August 20, 1986 Opinion is printed as Appendix F.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). The Ninth Circuit analyzed the nature of Supremacy Clause preemption in the context of Section 1983 and concluded that Supremacy Clause preemption will not support an action under Section 1983 where the preemption of state law is based upon federal occupation of the field and not upon actual conflict with explicit provisions of federal law. *White Mountain*, Appendix F, pp. 43a–48a. The court based this conclusion upon its analysis of the Supremacy Clause, which "is not a source of any federal rights," it simply secures existing federal rights "by according them priority whenever they come into conflict with state law." *White Mountain*, Appendix F, p. 43a, quoting from *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 at 613 (1979). The court further supported its conclusion based upon its analysis that Section 1983 was not intended to encompass those constitutional provisions, such as the Supremacy Clause, which allocate power between the national and state governments, but rather it was enacted to provide a remedy to secure individual rights against state infringement. *White Mountain*, Appendix F, pp. 44a-45a.

Having rejected the argument that the White Mountain Apache Tribe had enforced rights secured under the Constitution, the Ninth Circuit went on to analyze whether the Tribe had enforced rights secured by federal statutes within the meaning of Section 1983. The Ninth Circuit found no direct conflict between the state tax and the federal statutes and regulations governing tribal timber operations and thus concluded that the Tribe had not stated a Section 1983 cause of action for violation of rights secured by federal laws. *White Mountain*, Appendix F, pp. 48a–52a.

The parallels between *White Mountain* and this case are compelling. Both cases involved successful tribal challenges to state taxes in this Court. In both cases, this Court struck down the state tax on the basis that the tax conflicted with

federal policies and interests, as expressed in various federal statutes and regulations. Because the federal interests in each case occupied the field, imposition of the state tax was preempted. *White Mountain,* 448 U.S. 136 (1980); *Ramah,* 458 U.S. 832 (1982).

In deciding *Ramah,* this Court based its decision upon its prior opinion in *White Mountain.* As Justice Marshall wrote, "[T]his case is indistinguishable in all relevant respects from *White Mountain.*" *Ramah,* 458 U.S. at 840. Despite the "indistinguishable" nature of the *White Mountain* and *Ramah* cases, the New Mexico Court of Appeals arrived at the opposite conclusion from the Ninth Circuit when deciding whether the tribal entity had prevailed upon a claim that was cognizable as a Section 1983 claim for purposes of award of Section 1988 attorney's fees. In arriving at its decision, the court of appeals facially agreed with the Ninth Circuit's conclusion that the Supremacy Clause, itself, does not create rights which can be enforced in a Section 1983 action. *Ramah,* 720 P.2d at 1252. The court then examined whether the School Board had enforced any rights or immunities secured by federal statute, thereby prevailing upon a Section 1983 cause of action. It concluded that the Self-Determination Act, "by implication" created a right to be immune from state taxation which the state had violated for purposes of Section 1983. *Ramah,* 720 P.2d at 1254.

The court of appeals cited no language in the Act, no legislative history of the Act, no cases interpreting the Act nor any canons of statutory construction in support of its conclusion that the Self-Determination Act created a substantive right to tax immunity. Instead, the court simply asserted such a right "by implication." *Id.* at p. 1254. The court had to resort to "implication" because there is no language in the Self-Determination Act which imposes any duties or obligations on the states whatsoever, and the Act is totally silent as to state

taxation. To the extent that the Act confers rights on a tribal entity, those rights are only against the federal government. The Act recognizes Indian education to be an obligation of the federal government, and establishes procedures by which tribes may more actively participate in the education of their members. This Court did not hold that the state had violated the Self-Determination Act nor did it hold that the Act, by its own terms preempted state taxation. The Self-Determination Act was cited by this Court only as evidence of the extensive federal involvement in Indian education, and was only one of several federal statutes establishing the comprehensive federal involvement in Indian education which preempted the state tax. *Ramah,* 458 U.S. at 841-846.

In effect, the court below held that the Self-Determination Act creates a statutory tax immunity "by implication" simply because the immunity exists by reason of federal preemption. Unlike the Ninth Circuit in *White Mountain,* the court below did not distinguish the question of the existence of a § 1983 remedy from the question of the existence of the substantive tax immunity. The Ninth Circuit correctly limited the § 1983 remedy to direct violations of the provisions of a federal statute. Under the court of appeals' analysis, a statutory tax immunity may be grafted "by implication" onto a federal statute based on nothing more than a finding that the tax is preempted under the Supremacy Clause by extensive federal regulation. Notwithstanding the assertion of the court below, it is manifest that the state did not violate the Self-Determination Act nor can the School Board's litigation be properly characterized as an action to enforce federal statutes under Section 1983.

The New Mexico Court of Appeals' reliance upon "implication" to find that the Self-Determination Act created rights against the state which the School Board enforced under Section 1983 demonstrates that the Court misapprehended the true nature of the School Board's litigation—which involved

the distribution of governmental authority between federal, state and tribal governments. The implication of state tax immunity derives from the federal policy, reflected in part in the Self-Determination Act, recognizing tribal sovereignty and control over education. The state tax was ousted because federal policies and programs recognizing the federal obligation to provide for Indian education and the right of the tribes to coordinate their own educational programs occupied the field of Indian education and left no room for the state tax. The "implication" of tax immunity derives from these considerations of power allocation between national, state and tribal governments, not from any direct conflict between the state tax and a federal statute. Indeed, as this Court reiterated in *Ramah,* there need be no direct conflict between the state tax and a federal statute for the state tax to be prohibited. *Ramah,* 458 U.S. at 843-844.[5]

The Ninth Circuit in *White Mountain* correctly recognized that there is no basis for a Section 1983 claim based upon violation of federal statutes where there is no direct conflict between the state action and the federal statute, but the statute merely embodies federal policies applicable to states because of the Supremacy Clause. Although the New Mexico Court of Appeals purported to agree with the Ninth Circuit's conclusion that Supremacy Clause preemption based upon federal occupation of a field does not create the types of rights which can be enforced under Section 1983, the only rights and immunities which it ruled that the School Board enforced fall precisely in that category.

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[5] Presumably, if there was such a conflict in this case, this Court would have indicated so in its Opinion and would not have needed to analyze whether the state's tax was preempted under the comprehensive federal occupation of the field analysis which was applied.

Ramah and *White Mountain v. Bracker* were decided on the same basis: federal preemption of state taxation affecting Indians, based upon federal occupation of the field. The two cases are, in the words of this Court, "indistinguishable." This Court should grant the Writ of Certiorari to resolve the conflict between the Ninth Circuit and the New Mexico Court of Appeals and to decide whether this case was cognizable as a civil rights action under Section 1983 for which attorney's fees should be awarded under Section 1988.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the decision of the New Mexico Court of Appeals.

Respectfully submitted,

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September 2, 1986

APPENDIX A

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD,
INC., and LEMBKE CONSTRUCTION
COMPANY, INC.
Petitioners-Appellees,

vs. No. 7960

BUREAU OF REVENUE,
STATE OF NEW MEXICO,
Respondent-Appellant.

**APPEAL FROM THE DISTRICT COURT OF
SANTA FE COUNTY**
Petra Maes, Judge

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Santa Fe, New Mexico Attorneys for Petitioners-Appellees

OPINION

BIVENS, Judge

We withdraw the opinion filed on December 12, 1985, and substitute the following:

From an order awarding petitioners Ramah (Ramah School Board, Inc., and Lembke Construction Company, Inc.) attorney's fees pursuant to 42 U.S.C. Section 1988 following remand from the United States Supreme Court, respondent Bureau (Bureau of Revenue, State of New Mexico) appeals. The Bureau raises three issues:

1. Whether Ramah's complaint sufficiently pled a 42 U.S.C. Section 1983 violation so as to allow an attorney's fee award under section 1988;

2. Whether the Bureau is a "person" within the meaning of Section 1983; and

3. Whether the complaint states a cause of action cognizable under Section 1983.

We answer each issue in the affirmative and, therefore, affirm.

In 1978, Ramah sued for a refund of gross receipts taxes paid. This court affirmed a judgment in favor of the Bureau. *Ramah Navajo School Board Inc. v. Bureau of Revenue*, 95 708, 625 P.2d 1225 (Ct.App.1980), *cert. quashed*, 96 N.M. 17, 627 P.2d 412 (1981), *rev'd*, 458 U.S. 832 (1982). Ramah petitioned the United States Supreme Court which reversed on the basis that federal law preempted the assessment of the New Mexico tax on proceeds from the construction of a school on the Ramah Navajo reservation. *Ramah Nanajo School Board Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982).

Following remand, Ramah filed a motion for an award of attorney's fees under Section 1988, the Federal Civil Rights Attorney's Fees Awards Act. After a hearing the trial court awarded to Ramah attorney's fees. The parties stipulated.

as to the amount; therefore, the issue on appeal involves only the legality of the award.

In the Civil Rights Attorney's Fees Awards Act of 1976, Congress authorized the awarding of attorney's fees in a number of specific civil rights actions. The Act, in pertinent part, provides for the allowance of attorney's fees:

> [I]n any action or proceeding to enforce a provision of sections [42 U.S.C. §§ 1981, 1982, *1983*, 1985 and 1986 title IX of Public Law 92-318, [or in any civil action or proceeding, by by or on behalf of the United States of America, to enforce, or by charging a violation of, a provision of the United States Internal Revenue Code], or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs.

42 U.S.C. § 1988. (Emphasis added.)

Ramah claims entitlement to Section 1988 attorney's fees because its original action qualifies as one to enforce a provision of Section 1983, and because it prevailed in the lawsuit.

Section 1983 provides:

> Every person who, acting under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this action, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

In order for Ramah to succeed, it must have pled a Section 1983 cause of action; the Bureau must be a "person" within the meaning of Section 1983; and the cause of action must be one that is cognizable under Section 1983. The Bureau claims that Ramah fails each of those requirements. We now examine the Bureau's contentions.

1. Did the complaint sufficiently plead a Section 1983 violation?

In *Gomez v. Toledo*, the United States Supreme Court stated that by its "plain terms," Section 1983 requires "two-and only two-allegations." 446 U.S. 635, 640 (1980). First, the plaintiff must allege that he was deprived of a federal right. Second, the plaintiff must contend that the person who deprived him of the federally protected right was acting under the color of state or territorial law. *Id.*

While the Supreme Court, in *Gomez*, was discussing the standard of pleading required in a Section 1983 action when qualified immunity is at issue, lower courts, in cases more factually similar to ours, have basically reiterated the *Gomez* standard of pleading. For instance, in *Harradine v. Board of Supervisors*, a voting rights case, the plaintiff argued that the distribution and apportionment of the Board violated the equal protection clause of the Fourteenth Amendment and sections of the New York constitution. 73 A.D.2d 118, 425 N.Y.S.2d 182 (1980). The plaintiff prevailed in the suit and then sought attorney's fees under Section 1988 even though he had not specifically alleged, in his complaint or at trial, a Section 1983 violation. Accordingly, the question before the *Harradine* court, was whether a plaintiff who prevails in a state court suit, not arguing a Section 1983 violation but seeking to vindicate a federal civil right, should be allowed to recover Section 1988 attorney's fees. In answering that question, the court first noted that the purpose of Section 1988 was to encourage private citizens to act as private attorneys general in enforcing

civil rights and that Section 1988 should be construed so as to effectuate that purpose. The court, therefore, allowed recovery on the basis that "[t]he Civil Rights Attorneys Fees Awards Act must be broadly applied to achieve its remedial purpose." *Id.* at ____, 425 N.Y.S.2d at 188.

Similarly, in *Gumbhir v. Kansas State Board of Pharmacy*, 231 Kan. 507, 646 P.2d 1078 (1982), *cert. denied*, 459 U.S. 1103 (1983), the plaintiff argued in his complaint that the Board's denial of his license application violated his rights under the First, Fifth, and Fourteenth Amendments as well as Article 1, Section 8 of the United States Constitution. The plaintiff failed to plead specifically a Section 1983 violation. The plaintiff prevailed at trial with the court not reaching his claimed constitutional violations. He then sought attorney's fees under Section 1988. While acknowledging that "the better practice is to specifically plead a violation of Section 1983," the Kansas Supreme Court invoked Kansas' liberal rules of notice pleading to rule that the plaintiff had adequately pled a violation of his civil rights. *Id.* at 514, 646 P.2d at 1085. *See also Fairbanks Correctional Center Inmates v. Williamson*, 600 P.2d 743 (Alaska 1979); *Boldt v. State*, 101 Wis.2d 566, 305 N.W.2d 133, *cert. denied*, 454 U.S. 973 (1981). This result is consistent with New Mexico's liberal rules of notice pleading. *See* N.M. Civ.P. Rule 8 (Repl.Pamp.1980); *Temple Baptist Church, Inc. v. City of Albuquerque*, 98 N.M. 138, 646 P.2d 565 (1982).

Ramah specifically alleged that the Bureau, in implementing its tax program, was acting "under color of the New Mexico Gross Receipts and Compensating Tax Act," and the tax "constitutes interference by the State of New Mexico in Navajo self-government in violation of the Treaty of 1868 *and the laws of the United States.*" [Emphasis added.] Based on these authorities and the pleadings, we hold that Ramah's failure to plead specifically a Section 1983 violation does not bar its recovery of Section 1988 attorney's fees.

Two recent New Mexico cases do not persuade us differently. Both are distinguishable from the present case. In *Garcia v. State Board of Education,* this court denied plaintiff's request for attorney's fees, a request first asserted on appeal. 102 N.M. 306, 694 P.2d 1371 (Ct.App.), *cert quashed,* 102 N.M. 293, 694 P.2d 1358 (1985). We based our refusal on five grounds: first, the action was not brought under Section 1983; second, the plaintiff did not plead or prove that his civil rights were violated; third, the plaintiff did not prevail in the lawsuit; fourth, the plaintiff offered no proof that a Section 1988 award can be made when a Section 1983 claim is raised, for the first time, on appeal; and fifth, Section 1988 does not authorize an award of attorney's fees in an administrative proceeding.

In this case, Ramah prevailed. Ramah also demonstrated that a Section 1988 award may be made even though the case was not specifically litigated under Section 1983. Ramah did argue, in its complaint, that a federal right had been violated. Finally, this cases does not involve an administrative proceeding.

In *Chapman v. Luna,* the plaintiffs prevailed, in part, in their challenge to the Albuquerque/Bernalillo County Motor Vehicle Emission Inspection Program. 101 N.M. 59, 678 P.2d 687 (1984). On remand to the district court, plaintiffs sought Section 1988 fees because the state supreme court had ruled that a provision of the emissions inspection program violated "equal protection stnadards." In plaintiffs' complaint, however, they had failed to refer specifically to the New Mexico Constitution, the United States Constitution, Section 1983, or Section 1988. The district court rejected plaintiffs' claim to Section 1988 fees, and the state supreme court affirmed. 102 N.M. 768, 701 P.2d 367, *cert. denied,* ___U.S.___, 106 S.Ct. 345 (1985).

The supreme court held that the plaintiffs were unable to show that a "deprivation of a federal constitutional right was raised and decided in their favor . . . ." 102 N.M. at 769, 701 P.2d at 368. The supreme court stated that in deciding

Chapman v. Luna, while not specifically referring to the United States Constitution or the New Mexico Constitution, the court had based its decision on a violation of the New Mexico equal protection clause. Because the plaintiffs had not pled a federal claim and the court did not decide the case on the basis of a federal claim, the case was not decided under the federal Constitution. Therefore, an award of Section 1988 attorney's fees would not be appropriate. The court did indicate, however, that it might have reached a different conclusion if the plaintiffs had specifically pled a federal equal protection claim *or* a Section 1983 claim, and the court had decided the case on the basis of a federal claim.

Chapman, therefore, is distinguishable from our case. Ramah did specifically plead violations of federal law, and the case was decided on federal grounds.

The Bureau also argues that Ramah erred in not expressly praying in its complaint for the award of Section 1988 attorney's fees. This argument is not convincing. By its express language, Section 1988 dictates that a "court, in its discretion, may allow the prevailing party . . . . a reasonable attorney's fee *as part of costs.*" (Emphasis added.) Each of the counts in Ramah's complaint contained a prayer for relief which states "for *costs* of this action, and further such relief as to the Court seems just." (Emphasis added.) Additionally, the concluding prayer requested, in addition to the tax refund, the declaratory judgment, and the injunction, "Such other relief, *including costs,* interest, and so on, as the Court deems proper." (Emphasis added). Therefore, Ramah's failure to pray expressly for Section 1988 attorney's fees is not fatal to the award of attorney's fees. *See also Maine v. Thiboutot,* 448 U.S. 1 (1980).

2. Whether the Bureau is a "person" within the meaning of Section 1983.

At the outset of this discussion, we recognize that the United States Supreme Court, in *Hutto v. Finney,* ruled that in

passing Section 1988, Congress partially abrogated states' Eleventh Amendment immunity, pursuant to its plenary power to enforce the Fourteenth Amendment. 437 U.S. 678 (1978). The Court's ruling in *Hutto*, however, does not resolve the problem before us. In order to determine whether the trial court erred in awarding to Ramah Section 1988 attorney's fees, we must first decide whether Ramah pled a Section 1983 violation. Accordingly, we must determine whether the Bureau is a "person" within the meaning of Section 1983, and, therefore, capable of violating that section.

The question requires an analysis of congressional intent. For a long time, the answer, if not the rationale, was clear. Recent decisions, however, have resulted in a different understanding of the class of defendants made liable by Congress under Section 1983. Consequently, a more extensive analysis than was formerly required becomes necessary.

When Congress enacted Section 1983, it chose not to abrogate the state's sovereign immunity or Eleventh Amendment immunity. *Quern v. Jordan,* 440 U.S. 332 (1979). Sovereign immunity and Eleventh Amendment immunity are, of course, distinct concepts, but both immunities are designed to protect the same object–state government. *Civil Actions Against State Government: Its Divisions, Agencies and Officers* (Winborne, ed. 1982). The Eleventh Amendment shields the operation of state governments from intrusions from the federal judiciary while sovereign immunity protects state government affairs from interference by plaintiffs and state courts. *Id.* Therefore, when a Section 1983 suit is brought in federal court, the court analyzes whether the defendant is a "person" within the meaning of Section 1983 or, more meaningfully expressed, whether the Eleventh Amendment bars the suit from being brought against that defendant. Similarly, in Section 1983 actions brought in state courts, the court determines whether sovereignty [*sic*] immunity bars the suit. *Gumbhir v. Kansas State Board of Pharmacy.*

Before 1977, the belief generally held was that state agencies were not persons within the meaning of Section 1983. *Gumbhir v. Kansas State Board of Pharmacy.* In 1978, the United States Supreme Court handed down a landmark decision in *Monell v. New York City Department of Social Services,* 436 U.S. 658 (1978). In *Monell,* the Court ruled that the Eleventh Amendment did not bar suit under Section 1983 against municipalities and other local governments. Municipalities and local governments, therefore, were "persons" under Section 1983.

The Court's ruling, in *Monell,* created confusion in the lower courts. Some courts, in the wake of *Monell,* reasoned that there is no logical reason to distinguish between state and local agencies and, accordingly, ruled that states are "persons." *Stanton v. Godfrey,* 415 N.E.2d 103 (Ind.App.1981); *Atchison v. Nelson,* 460 F.Supp. 1102 (D.Wyo.1978). Most courts, however, have determined that *Monell* did nothing to alter either the Eleventh Amendment or sovereign immunity protective cloak of the states. *Holladay v. State of Montana,* 506 F.Supp. 1317 (D.Mont.1981) (memo.op.); *Ginter v. State Bar of Nevada,* 625 F.2d 829 (9th Cir.1980).

That the Eleventh Amendment is still a vital bar to a Section 1983 cause of action, in federal court, against a state or its agencies was articulated by the United States Supreme Court in *Quern v. Jordan.* The Court held that Congress, in enacting Section 1983, did not intend to destroy the states' Eleventh Amendment immunity from suits brought in federal court. *Quern.* It, therefore, logically follows that Congress also did not intend, in adopting Section 1983, to abrogate the states' sovereign immunity from Section 1983 suits brought in state courts. Suits against states or their agencies, however, may be brought under Section 1983 in state or federal court if the state has waived its Eleventh Amendment or sovereign immunity, by expressly consenting to suit. *Boldt v. State.*

The Eleventh Amendment immunity, nevertheless, is not absolute. The United States Supreme Court has carved out an

exception: prospective injunctive relief. In *Edelman v. Jordan*, the Court ruled that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury . . . ." 415 U.S. 651, 677 (1974) (citations omitted). In *Milliken v. Bradley*, the Court ruled that the prospective relief can require the expenditure of state funds so long as the relief comes into effect prospectively. 433 U.S. 267 (1977).

Lower federal courts, when confronted with the question of whether the state or its agency is a "person" under Section 1983, appear to analyze what relief is sought. If the plaintiff seeks prospective injunctive relief, the Eleventh Amendment will not bar the suit. If, however, the plaintiff seeks monetary damages, the Eleventh Amendment precludes the cause of action. *Tayyari v. New Mexico State University*, 495 F.Supp. 1365 (D.N.M.1980); *Gay Student Services v. Texas A & M University*, 612 F.2d 160 (5th Cir.), *cert. denied*, 449 U.S. 1034 (1980).

State courts, however, have not uniformly distinguished on the basis of relief sought whether sovereign immunity is a bar to a Section 1983 action. In *DeVargas v. State, ex rel. New Mexico Department of Corrections*, in which the plaintiff sought damages under Section 1983, this court ruled that the suit was a "nullity" because "[t]he State and its Department of Corrections are not persons within the meaning of § 1983." 97 N.M. 447, 449, 640 P.2d 1327, 1329 (Ct.App.1981), *cert. quashed*, 97 N.M. 563, 642 P.2d 166 (1982). This court did not, however, explain the rationale for its decision. Therefore, there are two possibilities as to the relevant law in New Mexico. First, it may be that the state and its agencies never are "persons" within the meaning of Section 1983; or, it may be that because the plaintiff sought damages in *DeVargas*, rather than prospective injunctive relief, the court ruled that the doctrine of sovereign immunity blocked the suit.

The second standard offers the better reasoned approach. While, as discussed earlier, the Eleventh Amendment and sovereign immunity are distinct concepts, each seeks to provide protection for the state treasuries. If the Eleventh Amendment does not bar a suit in which prospective injunctive relief is sought, there is no logical reason why sovereign immunity should bar such a suit in state court. Accordingly, the Kansas Supreme Court, in *Gumbhir v. Kansas State Board of Pharmacy*, ruled that "the sounder view in a case such as this, where prospective injunctive relief is sought, is that a state agency should be considered a 'person' under [§ 1983]." 231 Kan. at 513, 646 P.2d at 1084. *See also Woodbridge v. Worcester State Hospital*, 384 Mass. 38, ____, 423 N.E.2d 782, 786 n.7 (1981).

We note that in order to avoid the defense of Eleventh Amendment immunity, a plaintiff in federal court may be required to name an individual state officer as defendant. *See generally Milliken v. Bradley*, 433 U.S. 267, 289-290 (1977) (noting the history of the prospective-compliance exception reaffirmed in *Edelman v. Jordan*). The requirement that a plaintiff in federal court name a state officer as defendant is based on the fiction that in violating federally-protected rights, the state officer is "stripped of his official or representative character." *Ex parte Young*, 209 U.S. 123, 160 (1908). Because Ramah sued in state court, this particular aspect of Eleventh Amendment immunity is not relevant. We agree with the Kansas Supreme Court that, after *Monell*, a state and its agencies may be proper defendants in state court under Section 1983, provided principles of state sovereignity do not preclude recovery. *See Gumbhir*. For this reason, we reject the Bureau's contention on appeal that Ramah's complaint was defective because it named the agency rather than its director.

Therefore, in order to determine if the Bureau is a person, we analyze separately each relief sought by Ramah. Ramah sought three remedies: first, a refund of the tax monies; second, a declaratory judgment that imposition of the tax, in this case,

was beyond the jurisdiction of the Bureau; and, finally, a permanent injunction, enjoining the Bureau from further taxation of the construction project.

In its complaint, Ramah prayed for a tax refund, pursuant to NMSA Section 72-13-40(A)(2) (Supp.1975) (now codified as NMSA 1978, Section 7-1-26(A)(2).) In enacting that statute, the legislature clearly consented to suit, allowing a claimant to bring an action against the state for a tax refund. We do not believe, however, that in enacting this statute, the state consented to suit under Section 1983.

The statute contains absolutely no reference to Section 1983, the United States Constitution, or the laws of the United States. *See* NMSA 1978, § 41-4-4 (Repl.Pamp.1982). Additionally, the request for the tax refund is a recovery more akin to money damages than to prospective injunctive relief. In *Edelman v. Jordan,* the plaintiffs argued that the defendants were not promptly processing, as authorized, assistance applications. The court of appeals allowed the plaintiffs to recover those funds which were denied by the tardy processing of the applications. The appeals court justified the refund on the basis of "equitable restitution." The United States Supreme Court rejected such a characterization and ruled that the refund violated the Eleventh Amendment. The Court stated that such an award was "in practical effect indistinguishable in many aspects from an award of damages against the State." 415 U.S. at 668. *See Ford Motor Co. v. Department of Treasury of Indiana,* 323 U.S. 459 (1945) (Eleventh Amendment bars suit in federal court for tax refund).

We, therefore, hold that in allowing suits against the state for tax refunds, the legislature did not intend to waive the state's sovereign immunity for suits brought under Section 1983. *See Boldt v. State.* Furthermore, Ramah's request for a tax refund essentially was a request for "equitable restitution." If posed in terms of Section 1983, the claim would have been barred by the doctrine of sovereign immunity.

Next, Ramah requested a declaratory judgment ruling that the imposition of the gross receipts tax, in this case, was beyond the jurisdiction of the Bureau. Ramah requested the declaratory judgment pursuant to the New Mexico Declaratory Judgment Act. NMSA 1953, §§ 22-6-1 through 22-6-18 (Supp.1975) (now codified at NMSA 1978, §§ 44-6-1 through 44-6-15). Section 22-6-16 of the 1975 supplement provides:

> For the purpose of the Declaratory Judgment Act, the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the Constitution of the state of New Mexico, the Constitution of the United States or any of the laws of the state of New Mexico or the United States, or any statute thereof.

(Citation omitted.)

While this statute contains no express reference to Section 1983, it does provide that the state has waived its sovereign immunity for the purpose of suits seeking "a construction of" the Constitution and laws of the United States. Such declarations do not entail awards of money damages. Therefore, it is completely consistent with the notions of sovereign immunity to rule that for the purpose of Section 1983 causes of action seeking declaratory relief, the state has waived its sovereign immunity.

In its complaint, Ramah requested an interpretation of the New Mexico Constitution, the United States Constitution, and the laws of the United States. Section 22-6-16 is, therefore, precisely on point. For purposes of the declaratory judgment in this action, New Mexico has consented to suit.

Finally, Ramah sought a permanent injunction against the imposition of the gross receipts tax on the school construction project. This clearly represents a request for prospective injunctive relief. The doctrines of Eleventh Amendment and

sovereign immunity do not bar such suits. *Edelman v. Jordan; Gumbhir v. Kansas State Board of Pharmacy.* Therefore, for the purpose of the prospective injunctive relief, the Bureau is considered a "person" within the meaning of Section 1983.

After separately analyzing the three remedies which Ramah sought, it becomes apparent that the Bureau may not be considered a "person" for purpose of the refund (because sovereign immunity precludes such a claim being brought under Section 1983), but that the Bureau may be considered a "person" for purposes of the declaratory and injunctive relief. Such inconsistency is not fatal to Ramah's claim. In *Edelman v. Jordan,* the plaintiffs sought both damages and injunctive relief. Relying upon the Eleventh Amendment, the Court ruled that the suit was improper to the extent that monetary liability was sought. The suit was proper, however, insofar as prospective injunctive relief was requested. *See also Milliken v. Bradley.*

Applying that analysis to our case, the fact that the Bureau is not a "person" subject to liability under Section 1983 for purpose of the refund recovery would not foreclose Ramah's statement of a cause of action under that section. Because the Bureau is considered a "person" for purposes of the declaratory and injunctive recoveries, sovereign immunity concerns do not foreclose the determination of whether, in its complaint, Ramah stated a cause of action under Section 1983.

3. **Whether Ramah alleged the violation of a right actionable under Section 1983.**

That Ramah sufficiently alleged that the Bureau, acting under color of state law, interfered in Navajo self-government in violation of the Treaty of 1868 and the laws of the United States does not of itself justify an award of attorney's fees under Section 1988. These must be a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." In short, there must be a violation of a federally protected right.

Prior to 1980, the prevailing attitude was that the phrase "and laws" was limited to civil rights or equal protection laws. *See Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600 (1979). In a 1980 decision, *Maine v. Thiboutot,* the United States Supreme Court, however, radically expanded the scope of Section 1983 protection. 448 U.S. 1 (1980). Relying, essentially, upon the plain meaning of the language of Section 1983, the Court held that because Congress had attached "no modifiers" to the phrase "and laws," Section 1983 encompassed violations of federal statutory laws. *Id.* at 5. Accordingly, since the statutory action was appropriately brought as a Section 1983 action, and since Section 1988 makes no exception for statutory violations of Section 1983, Section 1988 attorney's fees clearly applied to that case.

Since deciding *Thiboutot,* however, the Court has narrowed the expansive scope of its ruling. Two limitations now preclude suit under Section 1983 based upon statutory violations. The first limitation arises when Congress includes within the legislation comprehensive remedial procedures. *Middlesex County Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1 (1981). The second limitation is more pertinent to the issue before us. In *Pennhurst State School and Hospital v. Halderman,* the Court ruled that in order for a statutory violation to give rise to a Section 1983 violation, the federal statute must have created a right, privilege, or immunity. 451 U.S. 1 (1981).

Because the Bureau relies heavily on *Pennhurst* in arguing that a federally protected right was not at issue in this case, we shall analyze *Pennhurst* in some depth. In *Pennhurst,* residents of a state hospital for the care of the mentally retarded challenged their conditions of confinement. The Third Circuit Court of Appeals issued a ruling in favor of the residents, holding that the "bill of rights" provision of the Developmentally Disabled Assistance and Bill of Rights Act had been violated.

Halderman v. Pennhurst State School and Hospital, 612 F.2d 84 (3d Cir.1979) (en banc).

On appeal, the Supreme Court, in determining whether Congress had intended, in passage of the Act, to create substantive, enforceable rights, first pinpointed the source of Congress' power to legislate. The Court concluded that the origin of the legislative power was Congress' spending power. When, pursuant to a federal grant program, Congress imposes enforceable, financial obligations on the states, Congress must "speak with a clear voice" in order to "enable the States to exercise their choice [to participate in the program] knowingly, cognizant of the consequences of their participation." 451 U.S. at 17. Because the "bill of rights" section of the Act contained no such express language, the Court held that the "bill of rights" was essentially precatory and, as such, unenforceable.

Ramah, in its complaint, based its suit on two, interrelated theories which are relevant to this appeal. The first theory was that the Bureau's imposition of the gross receipts tax on the school construction project unduly interfered with Navajo self-government, pursuant to the Indian Self-Determination and Educational Assistance Act (25 U.S.C. §§ 450a-450n) and the Treaty of 1868. Second, Ramah argued that the Supremacy Clause barred the imposition of the gross receipts tax because the collection of the tax burdened and interfered with "a clear federal policy and program for the education of Indian children."

The Bureau is correct in its assertion that the Supremacy Clause, alone, does not create federal substantive rights but merely is a policy of federalism. *See Chapman v. Houston Welfare Rights Organization.* The Indian Self-Determination and Educational Assistance Act provides no broad remedial procedures so the *Middlesex* limitation is not applicable. Ramah does not disagree; therefore, the appellate issue is whether Congress has created a federally-protected right which

New Mexico violated in collecting the gross receipts tax. Under *Pennhurst*, we must examine the origin and nature of the Indian Self-Determination and Educational Assistance Act in order to resolve the issue. The Bureau contends that the Act merely declares federal policy. We disagree.

Congress, in its statement of findings and its declaration of the policy of the Act provided:

> **§ 450. Congressional statement of findings**
>
> (a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that–
>
> (1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and
>
> (2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.
>
> (b) The Congress further finds that–
>
> (1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;
>
> (2) the Federal responsibility for and assistance to education of Indian children has

not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

450a. Congressional declaration of policy

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participations by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

25 U.S.C. §§ 450, 450a.

At first examination, the Act might arguably fall within the limitation *Pennhurst* placed upon federal statutory violations giving rise to a Section 1983 proceeding. As the Bureau argues, it could be that the Act "merely declares the federal government's policy of encouraging Indian self-government and Indian control of Indian education." Cases which the Bureau cites lend some support to that position. For instance, in *Perry v. Housing Authority of the City of Charleston,* the tenants of public housing projects sought declaratory and injunctive relief from indecent housing. 664 F.2d 1210 (4th Cir.1981). They alleged that the defendant's violation of various housing acts gave rise to a Section 1983 violation. The court ruled, however, that the acts created no federally protected substantive rights. Rather, the federal appropriations were designed to assist the states in remedying poor housing conditions. *See also Weems v. Pierce,* 534 F.Supp. 740 (C.D.Ill.1982) (federal housing acts created no right to compel aid recipients to provide rental assistance); and *Dopico v. Goldschmidt,* 518 F.Supp. 1161 (S.D.N.Y. 1981) (funding statutes created no substantive rights of handicapped access to mass transit). Applying a similar argument in our case, the Bureau contends that the Self-Determination and Educational Assistance Act conferred no rights upon Ramah but merely articulated Congress' encouragement of and assistance in the realization of Indian self-government and self-education.

The Bureau's argument, however, ignores the precise factual setting of this lawsuit. This case does not involve a federal/state funding statute such as generated the *Pennhurst* ruling. This case involves the unique relationship between the federal government and the Indian tribes. The source of Congress' power to legislate in federal grant cases is its spending power. In the grant cases, valid concerns legitimate courts' reluctance to interpret language in grant programs as creating substantive, enforceable federal rights. As one commentator has pointed out:

> Damages awards and attorney's fees, for example, may deplete funds from the very purposes which the program was meant to serve. There is the realistic possibility that, at least in the case of marginal programs, governments will decline to participate if they see serious, and unpredictable, costs. Additionally, extensive judicial involvement blurs matters of accountability.

Brown, *Whither Thiboutot? Section 1983, Private Enforcement, and the Damages Dilemma*, 33 De Paul L.Rev. 31, 55 (1984).

In our case, however, the origin of Congress' legislative authority was the Indian Commerce Clause. U.S. Const. art. 1, § 8, cl. 3. Concerns in the federal grant area, which inhibit *Thiboutot*, are not at issue here. Under the Indian Commerce Clause, Congress has broad authority to regulate tribal affairs. *Morton v. Mancari*, 417 U.S. 535 (1974). Within that grant of power is the recognition of the guardian-ward relationship which exists between the federal government and the Indian tribes. *Id.; U.S. v. Sandoval*, 231 U.S. 28 (1913). The guardian-ward relationship is based upon the tribes' dependence on the federal government "to aid the Indian in coping with an alien civilization which has inexorably altered the Indian's traditional way of life." Comment, *The Indian Battle for Self-Determination*, 58 Calif. L. Rev. 445, 450 (1970). Based upon this unique relationship, Congress, in enacting the Self-Determination and Educational Assistance Act, granted to the Indians the *right* to coordinate the education of their children on the reservation, in express recognition of the right's "crucial importance to the Indian people." 25 U.S.C. § 450(a)(3). By implication, Congress also granted the tribes an *immunity* from state taxation. The Bureau, by imposing the gross receipts tax on the school construction job, not only violated that right but also that immunity. *See Chase v. McMasters*, 573 F.2d 1011 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978).

In its decision in this case, the United States Supreme Court not only recognized that the federal and tribal interests arise from the Indian Commerce Clause, but also recognized an additional, independent source, "the semi-autonomous status of Indian tribes." 458 U.S. at 837. Either of these "independent but related" interests bar exercises of state authority over commercial activity on Indian reservations. The Court quoted with approval:

> "[e]ither [interest], standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop,' . . . against which vague or ambiguous federal enactments must always be measured."

Id. at 837-38, *quoting from White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980).

While the Court relied, in its holding, on the Indian Commerce Clause, the result we reach today also finds support in the second barrier which the Court indicated could be used to block state intrusion on commercial activity on the reservation, the semi-autonomous status of the Indian tribes. The tribe's *right* of self-government, however, is limited by broad Congressional power. *Id.* Congress, in our case, however, did not abrogate that tribal right but articulated that right in the Indian Self-Determination and Educational Assistance Act. Congress, thereby, gave the full force and effect of federal law to the tribal right to control the educational processes on the reservation.

Our discussion might end here except for three cases concerning tribal claims for Section 1988 attorney's fees which, we believe, merit discussion. In *White Mountain Apache Tribe v. Williams,* No. 81-5348 (9th Cir.Dec.19, 1985), the Arizona Highway Department and the Arizona Highway Commission assessed a tax upon a logging company which had contracted with the White Mountain Apache Tribe. The tribe had organized a tribal enterprise to engage in the harvest of timber. The United States Supreme Court ruled that the state taxes were preempted by a comprehensive federal regulatory plan which supervised the harvest and sale of tribal timber. *White Mountain Apache Tribe v. Bracker.* The tribe then requested an award of Section 1988 attorney's fees which the district court granted, and the Ninth Circuit Court of Appeals reversed. *White Mountain Apache Tribe v. Williams,* No. 81-5348 (9th Cir. Feb.7, 1984). When we filed our first opinion, in this case, the Ninth Circuit had decided to reconsider its ruling. Since the filing of our first opinion, the Ninth Circuit has issued its second opinion, again reversing the district court. Because the Bureau relies heavily on this decision, we discuss it.

White Mountain is distinguishable from our case in two respects. First, the federal statutes at issue in *White Mountain* were regulatory in nature. There was no evidence of Congressional intent to create individual rights; whereas, in our case, the entire basis of the litigation was to provide a school for the Ramah children. While education does not rise to the level of a fundamental right, for equal protection purposes, "education is perhaps the most important function of state and local governments." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 29 (1973), *quoting from Brown v. Board of Education,* 347 U.S. 483, 493 (1954). Similarly, it stands to reason that the education of Indian children is one of the most important functions that the tribal government performs. There can be no doubt that the Self-Determination and Educational Assistance Act concerns "individual rights." If Ramah

had not undertaken to operate a school system, the tribal children would have been forced either to curtail their educations or to leave the reservation in order to obtain educations. Either option would have been contrary to the essence of the Act.

Second, and more importantly, *White Mountain* is not inconsistent with the result which we reach today. The Ninth Circuit, relying on *Chapman v. Houston Welfare Rights Organization,* held that a violation of the Supremacy clause could not provide the basis for a Section 1983 cause of action. That holding is in accord with our result. Our case, however, is distinguishable. Congress here has created a federally enforceable right. Individual rights are presently at issue.

After we heard oral argument in this case, the Bureau directed our attention to additional authority, a recent federal district court opinion. *Yakima Indian Nation v. Whiteside,* No. C-83-604-JLQ (D.Wash. filed September 11, 1985). In that case, the court refused to find that the tribe's "right" to be free from the county's zoning authority was a federally enforceable right for purposes of Section 1983. According to the court, a Supremacy Clause violation alone, as in *White Mountain,* does not give rise to a Section 1983 cause of action. The court's holding also is consistent with the result we reach today. As with *White Mountain,* our case, however, is distinguishable. A right, cognizable under Section 1983, is here.

In a third recent case, the Arizona Court of Appeals ruled that the Indian trader statutes created rights enforceable under Section 1983. *Central Machinery Co. v. Arizona,* 12 Ind.L.Rptr. 5073 (June 27, 1985). Therefore, the Gila River Indian Tribe could recover Section 1988 attorney's fees. The tribe had prevailed in a lawsuit in which the United States Supreme Court ruled that the Indian trader statutes preempted Arizona's imposition of a transaction privilege tax upon a non-Indian tractor merchant. *Central Machinery Co. v. Arizona State Tax*

Commission, 448 U.S. 160 (1980). The merchant, as in our case, had passed the tax on to the Indian purchasers.

In determining whether Congress intended to create a right enforceable under Section 1983, the Arizona court looked first to the purpose of the federal Indian trader statutes. Because the avowed Congressional intent was to protect the Indians from state taxation of their transactions with traders, the court translated that Congressional purpose into a federally protected right "to be free from state taxation on their transactions with traders." 12 Ind.L.Rptr. at 5074. The court's conclusion was reinforced by its finding that Congress intended to confer a "special benefit" upon the tribe.

If the *Central Machinery* standard is applied to the facts in our case, the inescapable conclusion is that the Self-Determination and Educational Assistance Act created rights enforceable under Section 1983. The express purposes of the Act is to promote Indian self-determination and to facilitate tribally coordinated educational opportunities. Accordingly, those purposes can be translated into federally protected rights. Additionally, the language of the Act is not general or regulatory in nature but specifically aims toward providing a "special benefit" for tribal members. *See also The Confederated Salish and Kootenai Tribes of the Flathead Reservation v. Moe*, 392 F.Supp. 1297 (D. Mont.1974).[1]

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[1] In *Moe*, the district court ruled that the tribe's allegation that the state had violated the Commerce Clause was sufficient to state a claim under Section 1983. In reviewing the district court's decision, the United States Supreme Court found it unnecessary to reach that question. 425 U.S. 463, 475, n.14 (1976). ***But see Consolidated Freightways Corp. of Delaware v. Kassel***, 556 F.Supp. 740 (S.D. Iowa 1983) (Commerce Clause creates no rights enforceable under § 1983). The Bureau's strong reliance upon *Kassel* might be misguided because *Kassel* is not a case involving Indians.

In summary, we hold that the Indian Self-Determination and Educational Assistance Act created a right enforceable under Section 1983, and, therefore, that the trial court did not err in awarding Section 1988 attorney's fees to Ramah. First, the language and history of the Act evince a Congressional intent to create a tribal right to coordinate the education of its children. Second, recognition of the Indian right of self-government provides a "backdrop . . . against which vague or ambiguous federal enactments must always be measured." *White Mountain Apache Tribe v. Bracker,* 448 U.S. at 143. And, finally, Section 1988 should be construed liberally in order to realize the achievement of Section 1988's broad remedial purposes. *Harradine v. Board of Supervisors.*

The fact that Ramah prevailed in the litigation on the preemption claim rather than the violation of self-determination claim is not relevant. Section 1988 attorney's fees are awarded so long as the prevailing party "essentially succeeds in obtaining the relief he seeks in his claim on the merits." *Bagby v. Beal,* 606 F.2d 411, 415 (3d Cir.1979).

The judgment below is affirmed. Ramah shall recover its costs on appeal.

IT IS SO ORDERED.

s/ William W. Bivins
WILLIAM W. BIVINS, Judge

WE CONCUR:

s/ A. Joseph Alarid
A. JOSEPH ALARID, Judge

s/ Pamela B. Minzner
PAMELA B. MINZNER, Judge

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

BUREAU OF REVENUE, STATE
OF NEW MEXICO,
Petitioner,
vs. NO. 16,235
RAMAH NAVAJO SCHOOL BOARD,
INC., et al.,
Respondents.

WRIT OF CERTIORARI

THE STATE OF NEW MEXICO

TO: Court of Appeals

GREETING:

WHEREAS, the Petitioner, through its attorneys Paul Bardacke, Attorney General, Gerald B. Richardson, Special Assistant Attorney General, Santa Fe, NM, did apply to this Court on January 22, 1986 for its review of the decision handed down by the Court of Appeals on January 7, 1986 in Cause No. 7960 entitled Ramah Navajo School Board, et al vs. Bureau of Revenue; and

WHEREAS, the Supreme Court gave notice to the Court of Appeals on January 22, 1986, in compliance with Rule 28(f) of the Rules of Appellate Procedure for Civil Cases, that an application for writ of certiorari had been filed in the above entitled cause; and

WHEREAS, a copy of the application for writ of certiorari has been served on Respondents in the above entitled cause.

NOW, THEREFORE, the writ of certiorari is hereby granted, and the Court of Appeals is hereby ordered to proceed no

further in Cause No. 7960 pending the further Order of the Court.

WITNESS, The Hon. William Riordan, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 12th day of February, 1986.

(S E A L) s/Rose Marie Alderete

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO
Wednesday, February 12, 1986

NO. 16,235

BUREAU OF REVENUE,
STATE OF NEW MEXICO,
Petitioner,

vs.

RAMAH NAVAJO SCHOOL BOARD, INC.,
and LEMBKE CONSTRUCTION,
Respondents.

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is hereby granted, and the writ of certiorari shall issue from this Court as prayed for in the petition.

ATTEST: A TRUE COPY

s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO
Tuesday, June 3, 1986

NO. 16,235

BUREAU OF REVENUE, STATE
OF NEW MEXICO,
Petitioner,

vs.

RAMAH NAVAJO SCHOOL BOARD, INC.,
and LEMBKE CONSTRUCTION,
Respondent.

This cause having heretofore been submitted and taken under advisement and on February 12, 1986, a writ of certiorari was issued by this Court;

NOW, THEREFORE, IT IS ORDERED that the writ of certiorari heretofore issued in this cause on February 12, 1986 is hereby quashed as having been improvidently issued.

IT IS FURTHER ORDERED that the Record in Cause No. 7960 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

s/ Rose Marie Alderete

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT
FIRST JUDICIAL DISTRICT

RAMAH NAVAJO SCHOOL BOARD, INC.,
and LEMBKE CONSTRUCTION CO., INC.,
Petitioners,

v. No. CV SF-78-438

BUREAU OF REVENUE, STATE OF
NEW MEXICO,
Respondent.

ORDER

This matter came before the Court at hearing conducted September 23, 1983, on Petitioners' motion for attorney's fees pursuant to 42 U.S.C. § 1988. The Court, being apprised in the premises, finds:

1. This is an action authorized and prosecuted pursuant to 42 U.S.C. § 1983.

2. The Respondent is a person within the meaning of 42 U.S.C. § 1983.

3. No prejudice to Respondent will result from granting Petitioners' motion for attorney's fees.

4. Petitioners are the prevailing parties.

5. There are no special circumstances making an award of attorney's fees in this case unjust.

6. The sum of $100,000.00 represents a reasonable award of attorney's fees for the time and services expended on behalf of Petitioners on the merits and on the Motion for Attorney's Fees through the 17th day of May 1984.

THEREFORE IT IS ORDERED.

1. Petitioners' Motion for Attorney's Fees is granted.

2. Respondent shall pay to Petitioners the sum of $100,000.00.

Petra Jimenez Maes
DISTRICT JUDGE

NOTED:

s/ Michael P. Gross
MICHAEL P. GROSS
Counsel for Petitioners

s/ Jerry Richardson
JERRY RICHARDSON
Counsel for Respondent

APPENDIX E

INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT OF 1975, PUBLIC LAW 98-638 88 STAT. 2203, 25 U.S.C. §§ 450 et seq. (EXCERPTS)

INDIAN SELF-DETERMINATION

§ 450. Congressional statement of findings

(a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that–

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that–

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

§ 450a. Congressional declaration of policy

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

§ 450b. Definitions

(c) "Tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: *Provided,* That in any case where a contract is let or grant made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant;

§ 450f. Contracts by Secretary of the Interior with tribal organizations

(a) Request by tribe for contract by Secretary to plan, conduct and administer education, etc., programs; refusal of request

The Secretary of the Interior is directed, upon the request of any Indian tribe, to enter into a contract or contracts with any tribal organization of any such Indian tribe to plan, conduct, and administer programs, or portions thereof, provided for in sections 452 to 457 of this title, any other program or portion thereof which the Secretary of the Interior is authorized to administer for the benefit of Indians under sections 13 and 52a of this title, and any Act subsequent thereto: *Provided, however,* That the Secretary may initially decline to enter into any contract requested by an Indian tribe if he finds that: (1) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory; (2) adequate protection of trust resources is not assured, or (3) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract: *Provided further,* That in arriving at his finding, the Secretary shall consider whether

the tribe or tribal organization would be deficient in performance under the contract with respect to (A) equipment, (B) bookkeeping and accounting procedures, (C) substantive knowledge of the program to be contracted for, (D) community support for the contract, (E) adequately trained personnel, or (F) other necessary components of contract performance.

b) Procedure upon refusal or request to contract

Whenever the Secretary declines to enter into a contract or contracts pursuant to subsection (a) of this section, he shall (1) state his objections in writing to the tribe within sixty days, (2) provide to the extent practicable assistance to the tribe or tribal organization to overcome his stated objections, and (3) provide the tribe with a hearing, under such rules and regulations as he may promulgate, and the opportunity for appeal on the objections raised.

(c) Procurement of liability insurance by tribe as prerequisite to exercise of contracting authority by Secretary; required policy provisions

The Secretary is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this subchapter to obtain adequate liability insurance: *Provided, however,* That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance.

§ 450h. Grants to tribal organizations or tribes

(a) Request by tribe for contract or grant by Secretary of the Interior for improving, etc., tribal governmental, contracting, and program planning activities

The Secretary of the Interior is authorized, upon the request of any Indian tribe (from funds appropriated for the benefit of Indians pursuant to sections 13 and 52a of this title, and any Act subsequent thereto) to contract with or make a grant or grants to any tribal organization for–

(1) the strengthening or improvement of tribal government (including, but not limited to, the development, improvement, and administration of planning, financial management, or merit personnel systems; the improvement of tribally funded programs or activities; or the development, construction, improvement, maintenance, preservation, or operation of tribal facilities or resources);

(2) the planning, training, evaluation of other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 450f of this title and the additional costs associated with the initial years of operation under such a contract or contracts;

(3) the acquisition of land in connection with items (1) and (2) above: *Provided,* That in the case of land within reservation boundaries or which adjoins on at least two sides lands held in trust by the United States for the tribe or for individual Indians, the Secretary of Interior may (upon request of the tribe) acquire such land in trust for the tribe; or

(4) the planning, designing, monitoring, and evaluating of Federal programs serving the tribe.

(b) Grants by Secretary of Health and Human Services for development, maintenance, etc., of health facilities or services and improvement of contract capabilities implementing hospital and health facility functions

The Secretary of Health and Human Services may, in accordance with regulations adopted pursuant to section 450k of this title, make grants to any Indian tribe or tribal organization for–

(1) the development, construction, operation, provision, or maintenance of adequate health facilities or services including the training of personnel for such work, from funds appropriated to the Indian Health Service for Indian health services or Indian health facilities; or

(2) planning, training, evaluation or other activities designed to improve the capacity of a tribal organization to enter into a contract or contracts pursuant to section 450g of this title.

(c) Use as matching shares for other similar Federal grant programs

The provisions of any other Act notwithstanding, any funds made available to a tribal organization under grants pursuant to this section may be used as matching shares for any other Federal grant programs which contribute to the purposes for which grants under this section are made.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED Aug. 20, 1986
Cathy A. Catterson, Clerk
U.S. Court of Appeals

WHITE MOUNTAIN APACHE TRIBE, an Indian tribe established pursuant to Executive Order, et al., Plaintiffs-Appellees,	No. 81-5348
v.	DC No. CV 73-788 PCT WEC
JACK WILLIAMS, Governor of the State of Arizona, et al., Defendants, and JOHN McLAUGHLIN, Chairman, Arizona State Transportation Board, et al., Defendants-Appellants.	**AMENDED OPINION**

Appeal from the United States District Court
for the District of Arizona
Honorable Walter E. Craig, U.S. District Judge, Presiding

Argued and Submitted April 6, 1982—Los Angeles, California
Decided February 7, 1984
Petition for Rehearing Granted April 25, 1984
Reargued and resubmitted July 18, 1984—Phoenix, Arizona

Before: FLETCHER,* and NORRIS, Circuit Judges, and BURNS,** District Judge.

NORRIS, Circuit Judge:

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* Following the death of Senior Circuit Judge Walter Ely, Judge Fletcher was selected to replace him on the panel.

** Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

This appeal presents the question whether Pinetop Logging Company ("Pinetop") and the White Mountain Apache Tribe (the "Tribe") have stated a claim under 42 U.S.C. § 1983[1] for which attorneys' fees are available under the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988 (1976).[2]

I

The facts of this case are set out more fully in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In brief, the White Mountain Apache Tribe, which inhabits a reservation in Arizona, organized a tribal enterprise to harvest timber. In 1969 the enterprise entered into a contract with Pinetop Logging Company which provided that Pinetop would perform logging operations on the reservation. *Id.* at 139. In 1971, the Arizona Highway Department and the Arizona Highway Commission assessed a motor carrier license tax and a use fuel tax against Pinetop for activities it performed pursuant to the contract. *Id.* at 139-40. Pinetop paid the taxes under protest, and then brought suit in state court to recover them. *Id.* at 140.

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[1] 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Award Act of 1976, provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In December 1973, after the Tribe had agreed to reimburse Pinetop for the assessed taxes, *id.* at 140, Pinetop and the Tribe brought suit in federal court, seeking a declaratory judgment and an injunction to prevent any further imposition of state taxes against Pinetop.[3] In their federal complaint, Pinetop and the Tribe contended that federal law preempted the state tax laws and that the tax violated their rights to due process and equal protection.

Shortly after commencement of the federal action, the State of Arizona filed a motion requesting the district court to abstain on the ground that "the Arizona tax statutes here in question may be susceptible to an authoritative construction by the state courts in the pending state court action that would avoid or modify the Federal constitutional questions raised." The district court granted the motion, relying on the Supreme Court's decision in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), and at the same time granted a consent temporary restraining order forbidding the state agencies to assess further taxes against Pinetop.

Although not required to do so, Pinetop and the Tribe then elected to submit their federal preemption claim to the Arizona courts along with the questions of state law. In May 1975, the Arizona Superior Court rejected all their claims, state and federal, and entered judgment for the state. The federal district court then dismissed the federal action sua sponte. In early 1976, however, upon the motion of Pinetop and the Tribe, the district court vacated the dismissal order and entered a consent preliminary injunction pending final outcome of the state proceedings. In 1978, the Arizona Court of Appeals affirmed the state trial court judgment, characterizing the Tribe's

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[3] The Anti-Injunction Act, 28 U.S.C. § 1341 (1982), denies federal courts jurisdiction to enjoin state taxes. Federal jurisdiction in this case, however, rests on 28 U.S.C. § 1362, as interpreted in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475 (1976), which creates an exception to the Anti-Injunction Act in actions by Indian tribes to enjoin state taxes.

arguments as "pure sophistry." *White Mountain Apache Tribe v. Bracker,* 120 Ariz. 282, 290, 585 P.2d 891, 899 (Ct. App. 1978), *rev'd*, 448 U.S. 136 (1980).

After the Arizona Supreme Court declined review, the state returned to federal district court with a motion to quash the consent preliminary injunction and to dismiss the federal action. The district court denied the state's motion. The United States Supreme Court then reversed the Arizona Court of Appeals, holding that the state taxes were preempted because the comprehensive federal regulatory scheme governing the harvest and sale of tribal timber had occupied the field and because the state taxes would interfere with federal goals and policies. 448 U.S. at 151. Armed with a favorable state court judgment on their federal claims, Pinetop and the Tribe then returned to the district court seeking a declaratory judgment, a permanent injunction and attorney's fees. The district court granted all the relief sought, including attorney's fees of $206,012.07. The state appeals. We reverse.

II

We first address the question whether Pinetop and the Tribe have stated a claim under § 1983 for which attorney's fees are available under § 1988. Pinetop and the Tribe argue that a claim of preemption of the state's power to tax Pinetop's logging operations on the reservation constitutes a claim of deprivation of "rights, privileges, or immunities secured by the Constitution and laws" within the meaning of § 1983. The Supreme Court decided in *Bracker, supra,* that the federal laws regulating the harvest and sale of tribal timber did preempt the Arizona tax statutes, reasoning that

> Where . . . the Federal Government has undertaken comprehensive regulation of the harvesting and sale of tribal timber, where a number of policies underlying the federal regulatory scheme

> are threatened by the taxes respondents seek to impose, and where respondents are unable to justify the taxes except in terms of a generalized interest in raising revenue, we believe that the proposed exercise of state authority is impermissible.

Bracker, 448 U.S. 136, 151 (1980). Although the Court acknowledged that "traditional notions of Indian self-government . . . provided an important 'backdrop'" for its analysis, 448 U.S. at 143, it explicitly "based [its decision] on the preemptive effect of the comprehensive federal regulatory scheme" governing the timber harvest. *Id.* at 151 n.15.

The question whether the Supremacy Clause (U.S. Const. art. VI cl. 2) may be used as a sword in bringing a § 1983 action is, of course, different from that decided by the Supreme Court in *Bracker* – whether the Supremacy Clause may be invoked as a shield against the imposition of state taxes on tribal logging operations heavily regulated by the federal government. It is the former question that we must address.

Pinetop and the Tribe argue that because the federal laws that regulate timber operations on tribal lands are intended to benefit the Tribe, the laws may serve as the basis for a § 1983 claim. That the Tribe benefits from the federal timber regulations, however, is not dispositive of the issue. In this case, Pinetop and the Tribe did not prevail in the Supreme Court on a theory that the state had *violated* any of the federal laws or regulations governing logging operations on tribal lands. Rather, the Supreme Court in *Bracker* reasoned that state taxes were preempted because the federal government had pervasively regulated tribal logging operations and because state taxation would interfere with the goals and purposes of the federal regulatory scheme.

Thus the question presented is whether the Tribe's preemption claim, based on federal occupation of a regulatory field

and inconsistency of state action with federal goals and policies, will support a civil rights action under § 1983.

A

The Supreme Court has never directly addressed the question whether the Supremacy Clause creates "rights, privileges or immunities" within the ambit of § 1983. In *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600 (1979), however, the Supreme Court did hold that the Supremacy Clause is not a substantive constitutional provision that creates rights within the meaning of 28 U.S.C. § 1343(3). *Id.* at 612-15.[4] The Court noted, "even though that Clause is not a source of any federal rights, it does 'secure' federal rights by according them priority whenever they come in conflict with state law. In that sense all federal rights, whether created by treaty, by statute, or by regulation are 'secured' by the Supremacy Clause." *Id.* at 613. Under *Chapman,* therefore, the Supremacy Clause, standing alone, 'secures' federal rights only in the sense that it establishes federal-state priorities; it does not create individual rights, nor does it 'secure' such rights within the meaning of § 1983.

The primary function of the Supremacy Clause is to define the relationship between state and federal law. It is essentially a power conferring provision, one that allocates authority between the national and state governments; thus, it is not a rights conferring provision that protects the individual against government intrusion. The distinction between the two categories of constitutional controls has been enunciated by Professor Choper:

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[4] Section 1343(3) is the statutory provision conferring jurisdiction on federal district courts to hear actions commenced "[t]o redress the deprivation, under color of state law . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights." 28 U.S.C. § 1343(3).

> When a litigant contends that the national government (usually the Congress, but occasionally the executive, either alone or in concert with the Senate) has engaged in activity beyond its delegated authority, or when it is alleged that an attempted state regulation intrudes into an area of exclusively national concern, the constitutional issue is wholly different from that posed by an assertion that certain government action abridges a personal liberty secured by the Constitution. The essence of a claim of the latter type – which falls into the individual rights category of constitutional issues . . . – is that no organ of government, national or state, may undertake the challenged activity. In contrast, when a person alleges that one of the federalism provisions of the constitution has been violated, he implicitly concedes that one of the two levels of government – national or state – has the power to engage in the questioned conduct. The core of the argument is simply that the particular government that has acted is the constitutionally improper one. To put it another way, a federalism attack on conduct of the national government contends that only the states may so act; a federalism challenge to a state practice asserts that only the central government possesses the exerted power; neither claim denies government power altogether.

J. Choper, *Judicial Review in the National Political Process,* 174-75 (1980) (quoted with approval in *United Nuclear Corp. v. Cannon,* 564 F. Supp. 581 (D. R.I. 1983) and *Consolidated Freightways v. Kassel,* 556 F. Supp. 740, 746 (S.D. Iowa 1983) *aff'd* 730 F.2d 1139 (8th Cir.), *cert. denied,* 105 S.Ct. 126 (1984)).

We believe that § 1983 was not intended to encompass those Constitutional provisions which allocate power between

the state and federal government. *See Consolidated Freightways v. Kassel, supra,* 730 F.2d at 1146 & n.16. The following excerpt from a speech by Representative Shellabarger, a leading proponent of the 1871 Act, confirms the limited intentions of the framers of the § 1983:

> Most of the provisions of the Constitution which restrain and directly relate to the States, such as those in tenth section of first article, that "no State shall make a treaty," "grant letters of marque", "coin money," "emit bills of credit," & c., relate to the divisions of the political powers of the State and General Governments. They do not relate directly to the rights of persons within the States and as between the States and such persons therein. These prohibitions upon the political powers of the States are of such a nature that they can be, and even have been, when the occasion arose, enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States "enforced" these provisions of the Constitution. But there are some that are not of this class. These are where the court secures the rights or liabilities of persons within the States, as between such persons and the States.

Cong. Globe, 42d Cong. 1st Sess., App. 69 (1871). As the Eighth Circuit has observed, "the implication of Rep. Shellabarger's statement is that § 1983 was enacted to provide a remedy for the latter category of constitutional violation he mentions, and not the former." *Consolidated Freightways v. Kassel, supra,* 730 F.2d at 1146 n.16.

Following the lead of the Supreme Court in *Chapman* and the framers of § 1983, the District of Rhode Island has answered in the negative the question whether the Supremacy

Clause will support an action based on § 1983. In *United Nuclear Corp. v. Cannon,* 564 F.Supp. 581 (D. R.I. 1983), a utility sought fees under § 1988 after successfully challenging on preemption grounds a state statute imposing a bonding requirement on a nuclear power generating facility. The court there held that a successful Supremacy Clause challenge to state legislation could not serve as the basis for a § 1983 action, and hence attorney's fees were not available under § 1988. *Id.* at 585-87. The Eleventh Circuit reached the same conclusion in a decision affirming the dismissal of a § 1983 action: "The sole cause of the unconstitutionality was the supremacy clause. Therefore Pirolo is not entitled to a § 1983 remedy for enforcement of the ordinances." *Pirolo v. City of Clearwater,* 711 F.2d 1006, 1011 (11th Cir.), *reh'g denied,* 720 F.2d 688 (11th Cir. 1983).

An analogous question is posed by the invocation of § 1983 in cases based on the dormant Commerce Clause, another constitutional provision that has as its primary function the allocation of power between national and state governments. The most extensive treatment of the issue was provided by the Eighth Circuit in *Consolidated Freightways v. Kassel, supra,* a case in which a trucking firm sought § 1988 attorney's fees based on its successful dormant Commerce Clause challenge to an Iowa statute banning 65-foot twin trailer trucks. The Eighth Circuit held that

> Although the Commerce Clause differs from the Supremacy Clause in that the Commerce Clause is a specific grant of legislative power to Congress, the two clauses are analogous in the sense that both clauses limit the power of a state to interfere with areas of national concern. Just as the Supremacy Clause does not secure rights within the meaning of § 1983, neither does the Commerce Clause.

Id. at 1144. The Eighth Circuit's reasoning implies that the Supremacy Clause alone will not support a § 1983 action.

A similar question was addressed in *Connor v. Rivers,* 25 F. Supp. 937 (N.D. Ga. 1938), *aff'd,* 305 U.S. 576 (1939). There the district court decided that a dormant Commerce Clause claim did not provide jurisdiction under § 1343(3) – the provision for federal jurisdiction over civil rights cases irrespective of the amount in controversy – based on an analysis of the history of § 1983.[5] *Id.* at 938. Because *Connor* was decided at a time when the general federal question jurisdictional provision contained an amount in controversy provision, the suit could only be maintained in federal court if it was maintainable as a civil rights action under § 1343(3). The Supreme Court affirmed *Connor* in a one sentence per curiam opinion noting the lack of the requisite jurisdictional amount in controversy. *Connor* reinforces the conclusion we draw from *Chapman:* power conferring provisions of the Constitution do not create "rights, privileges, or immunities" within the meaning of § 1983. Although there are federal court decisions that have held or assumed that the dormant Commerce Clause does support an action under § 1983,[6] we find them unpersuasive because they do not undertake a substantial analysis of the issue. *See Consolidated Freightways Corp. v. Kassel,* 556 F. Supp., at 744-45.

We thus come down on the side of the weight of authority that preemption of state law under the Supremacy Clause – at least if based on federal occupation of the field or conflict with federal goals – will not support an action under § 1983,

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[5] At the time *Connor* was decided, § 1983 was codified as 8 U.S.C. § 43 and § 1343(3) was codified as 28 U.S.C. § 41(14).

[6] *See Kennecott Corp. v. Smith,* 637 F.2d 181 (3d Cir. 1980); *Confederated Salish and Kootenai Tribes v. Moe,* 392 F. Supp. 1297 (D. Mont. 1974), *aff'd on other grounds,* 425 U.S. 463 (1976); *Confederated Salish and Kootenai Tribes v. Montana,* 392 F. Supp. 1325 (D. Mont. 1974).

and will not, therefore, support a claim of attorney's fees under § 1988.[7]

B

Pinetop and the Tribe do not directly confront the question whether the actual ground on which the decision in *Bracker* was made – preemption based on federal "occupation of the field" and "conflict with federal goals" – will support a § 1983 action. Rather, their argument seems to assume that there is a direct conflict between Arizona's tax and the federal regulations governing timbering on tribal lands. Thus, the Tribe's argument emphasizes the statutory scheme regulating logging operations on tribal lands – an emphasis that would be appropriate were this a direct conflict case. Because the Arizona tax does not directly violate any federal law or regulation, the Tribe's argument does not confront the crucial issue.

In developing their argument, Pinetop and the Tribe rely on *Maine v. Thiboutot*, 448 U.S. 1 (1980), in which the Court held that plaintiffs could recover in an action grounded on state violations of the Social Securtity Act because "the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." *Id.* at 4. Unlike the situation in *Thiboutot*, no federal statute or regulation was violated by the Arizona tax on Pinetop's logging operation. Moreover, although some courts broadly interpreted the *Thiboutot* language to mean that § 1983 encompassed all federal statutes,

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[7] We emphasize that we are not dealing with a case where state action is in actual conflict with the explicit provisions of federal law. Therefore, we need not reach the question whether a Supremacy Clause claim might give rise to a § 1983 action where preemption was based on such actual conflict. Here we deal only with preemption based on federal occupation of the field and conflict between state law and federal goals and policies. For a discussion of the various branches of preemption doctrine, see generally L. Tribe, *American Constitutional Law* 376-89 (1978).

see, e.g., Yapalater v. Bates, 494 F.Supp. 1349, 1358 (S.D.N.Y. 1980), *aff'd,* 644 F.2d 131 (2d Cir. 1981), *cert. denied,* 455 U.S. 908 (1982), the Supreme Court has since recognized that not all federal statutes secure rights within the meaning of § 1983. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 453 U.S. 1, 19 (1981); *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1 (1981).

Recognizing the Supreme Court's limitation of *Thiboutot* imposed by *Sea Clammers* and *Pennhurst,* Pinetop and the Tribe contend that our decision in *Boatowners and Tenants Association v. Port of Seattle,* 716 F.2d 669 (9th Cir. 1983) supports their position. In *Boatowners,* an association of pleasure craft owners charged that the manner of operation of a municipal marina violated the River and Harbor Improvements Act, 33 U.S.C. §§ 540-633 (1982), and thereby constituted a deprivation of federal statutory rights cognizable under § 1983. We found that although pleasure craft owners certainly benefitted from the general navigational improvements fostered by this federal scheme, "there is no indication that the statute was intended to benefit specially the pleasure craft owners . . . nor that Congress intended to confer federal rights on [them]." *Id.* at 673 (footnote omitted). Accordingly, we held that the pleasure craft owners as a class had no "enforceable rights" as required by *Pennhurst* and *Middlesex County* for maintaining a § 1983 action. Pinetop and the Tribe argue that they are "specially benefitted" by the federal laws and regulations governing timber operations on tribal lands. Thus, they contend that Supremacy Clause preemption by those laws and regulations creates a "right, privilege or immunity" within the meaning of § 1983.[8]

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[8] The dissent argues that the violation of federal regulations governing the harvest of tribal timber would give rise to a § 1983 action because those statutes were designed to benefit the Tribe. *Dissent* at 5-11. While we disagree that these regulations intended to create rights enforceable

The relevant focus for inquiry, however, is not primarily whether the regulatory scheme was designed to benefit the Indians. Indeed it may have been so designed. Rather the focus must be on the basis of the Supreme Court's decision in *Bracker* – preemption pursuant to the Supremacy Clause. So directed, our inquiry leads to the conclusion that the *Bracker* decision is grounded not on individual *rights* but instead on considerations of *power* – the division of authority between the states and the national government. As the Court noted, "At the most general level, the taxes would threaten the overriding *federal objective* of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding . . . .'" *Bracker, supra,* 448 U.S. at 149 (citation omitted) (emphasis added). The court continued: "In addition the taxes would *undermine the Secretary's ability* to make the wide range of determinations committed to his authority concerning the setting of fees and rates with respect to the harvesting and sale of tribal timber." *Id.* (emphasis added). Hence, the focus of concern in *Bracker* is state interference with federal policy objectives and the free exercise of authority by federal officials – not individual or tribal rights.

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8 Cont.
under § 1983, it is perhaps more important that the Tribe has never contended – and no court has ever found – that these statutes were ever violated In our view, therefore, the Tribe fails to clear the first hurdle presented by the *Thiboutot–Pennhurst–Sea Clammers* line of cases. Unlike the situation in *Thiboutot,* or in *Boatowners,* no federal statute or regulation was violated by the Arizona tax on plaintiffs' logging operations. Rther we have a case in which pervasive federal regulation precludes *any* state regulation. *See Bracker,* 448 U.S. at 148. Section 1982, as interpreted in *Thiboutot* and its progeny, enforces federal statutory rights only against direct violations of the federal statute in question. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n,* 453 U.S. 1, 19 (1981) (*Thiboutot* recognized § 1983 action on behalf of "a private party *claiming that a federal statute has been violated* under color of state law."); *Pennhurst,* 451 U.S. at 28 (remanding for a determination of whether the state officials violated the DDA).

Moreover, the Tribe's exemption from state taxation of its timber business does not implicate individual rights; rather the exemption derives from its status as a sovereign.[9] *See Bracker,* 448 U.S. at 148. Nor did the federal legislation create in the Tribe any new interest in the timber; the timber was already "owned by the United States for the benefit of the Tribe . . . ." *Id.* at 138. The central thrust of the legislation is merely to vest in the Secretary of the Interior authority to regulate the business of harvesting and selling the timber. *See* 25 U.S.C. §§ 406-407 (1982). In exercising that authority, the Secretary, of course, is required to base his decisions "upon a consideration of the needs and best interests" of the tribal owner. *Id.* § 406(a). However, the critical inquiry – as the Supreme Court made particularly clear in *Sea Clammers* – is whether there is any basis for the judiciary to infer a congressional intent to create rights enforceable under § 1983. 453 U.S. at 19-20. We find no basis for inferring such an intent in this case. For the purpose of applying § 1983 doctrine as

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[9] Indeed, the Tribe's right to invoke the power of federal courts to enjoin Arizona from taxing Pinetop's logging operations rests on considerations of sovereignty, not individual rights. Any plaintiff other than an Indian tribe would be barred by the Tax Injunction Act from bringing a § 1983 action to enjoin state taxation and hence from obtaining attorney's fees under § 1988. While we do not address the question whether the Tribe may bring a § 1983 action to enjoin state taxation, we do note the hoops that the dissent is forced to jump through to make this determination. *See Dissent,* at 18-20 & n.16. The dissent recognizes that a tribe cannot avoid the bar of the Tax Injunction Act in an action based on the rights of individual tribe members. *Id.* at 19 n.15. The dissent also acknowledges that it is doubtful whether a tribe "qua sovereign" would qualify as a "citizen of the United States or other person" entitled to sue under § 1983. *Id.* The dissent purports to overcome these hurdles by opining that here the Tribe may sue under § 1983 because it is acting in this case as a "incorporated business entity". *Id.* at 20. Conventional business entities – such as Pinetop – would, of course, be barred by the Tax Injunction Act from bringing this action in federal court.

enunciated in *Thiboutot* and its progeny, we see nothing remarkable about the fact that Congress intended the federal regulation to protect the interests of the beneficial owner of the timber. Indeed, the kind of regulatory legislation involved in this case is analogous to that involved in *Boatowners* where we also found no "enforceable rights." 716 F.2d at 673-74. There it was the regulation of municipal marinas; here it is the regulation of tribal timber business.

In sum, the Arizona tax on Pinetop's logging operations did not violate any federal statute. Nor is the existence of a federal "goal" or "policy", standing alone, sufficient to create a right cognizable under § 1983. Rather, the tax ran afoul of the Supremacy Clause because it was deemed to interfere in a general way with the authority and policies of the federal government. To be sure, the Supremacy Clause shielded the Tribe's timber business from state taxation, giving the Tribe a federal defense to any action brought by the state to collect the taxes; it does not follow, however, that in enacting the regulatory legislation, Congress intended to confer on the Tribe the right to use § 1983 as a sword to enjoin the collection of state taxes. The Tribe's § 1983 claim, rooted as it is in the power conferring function of the Supremacy Clause, must fail.

We therefore hold that the premption claim of Pinetop and the Tribe does not give rise to a claim cognizable under § 1983. Accordingly, we conclude that the preemption claim does not support an award of attorney's fees under § 1988.

III

A

Plaintiffs argue in the alternative that even if their preemption claim does not give rise to a fee award under § 1988, they are entitled to fees on the basis of pendent Fourteenth Amendment claims pleaded in their original federal complaint. Plaintiffs rely upon *Maher v. Gagne*, 448 U.S. 122 (1980), for the proposition that a plaintiff who prevails on a claim not

cognizable under § 1983 may recover fees under § 1988 on the basis of an unadjudicated constitutional claim that satisfies the "substantiality" test of *Hagans v. Lavine*, 415 U.S. 528 (1974).

We reject this claim principally because plaintiffs have failed to provide us with any meaningful basis for evaluating their Fourteenth Amendment claims. All we have to go on in trying to understand and analyze the claims are the bare allegations in the complaint filed at the outset of the federal court action. Plaintiffs tell us nothing more about the claims other than that the complaint "specifically alleges claims under the Equal Protection Clause, Due Process Clause, and Indian Commerce Clause." Appellees' Answering Brief, at 50-51. We find these allegations, standing alone, far too meager to enable us to determine whether the claims meet the substantiality test of *Hagans v. Lavine*.[10]

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[10] Plaintiffs pleaded their equal protection claim in the district court as follows:

> The denial of equal protection results from the state's attempt to impose unapportioned taxes on the plaintiffs' logging operations occurring partly over roads maintained by the State of Arizona, but not on other operations that occur in part over state roads and part over non-state roads. There is no attempt to impose similar unapportioned taxes on carriers that operate partly in the State of Arizona and partly within some other state, and A.R.S. § 40-641 expressly exempts "receipts from property transported under a star route contract of the federal government."
>
> There is no legal basis for the taxation; the taxation is arbitrary and discriminatory, lacking any rational basis. First Amended Complaint, Paragraph XXIII.

Plaintiffs' due process claim was pleaded in its entirety as follows:

> The unapportioned application of these taxes to the plaintiffs' operations constitutes a taking in contravention of the Fourteenth Amendment of the United States Constitution as due process is denied. First Amended Complaint, Paragraph XXIV.

The merit of plaintiffs' constitutional claims is rendered suspect not only by plaintiffs' failure to present this court with anything beyond a reference to the bare bones allegations of the complaint, but also by plaintiffs' failure to litigate these claims in the state courts. After the district court entered its *Pullman* absention order, plaintiffs tendered their preemption claim to the state courts, but not the due process and equal protection claims.[11] Moreover, we agree with Amici Curiae that it is difficult to take these Fourteenth Amendment claims seriously "when the plaintiffs themselves did not think enough of the claims to even assert them in their brief to the U.S. Supreme Court."[12] Brief of Amici Curiae, at 8.

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[11] Although we do not have before us the record in the state court action, we infer that plaintiffs did not tender the Fourteenth Amendment claims to the state courts because plaintiffs have not disputed the state's contention that the plaintiffs "never argued in the state courts nor in the Supreme Court any constitutional violation." Reply Brief of Appellant, at 16. The record is clear that the claims are not mentioned in the published opinion of the Arizona Court of Appeals, *White Mountain Apache Tribe v. Bracker*, 120 Ariz. 282, 585 P.2d 891 (Ct. App. 1978), *rev'd*, 448 U.S. 136 (1980), and were not raised in the United States Supreme Court. *See* note 12, *infra*.

[12] Plaintiffs' response to this argument by Amici is grossly misleading. Plaintiffs say that their failure to raise the Fourteenth Amendment claims before the Supreme Court "proves only that the Supreme Court is the master of its docket, [because the Court] granted certiorari *only* on the federal preemption issue, and the plaintiffs briefed nothing more." Appellees' Answering Brief at 51-52 (emphasis in original). The clear implication of this explanation is that plaintiffs raised the due process and equal protection claims in their Petition for Certiorari, but that the Court's order granting certiorari excluded those claims from consideration. Upon recalling and reviewing the Petition for Certiorari and the various briefs in *White Mountain Apache Tribe v. Bracker*, we learned what plaintiffs failed to tell us: They did not raise any Fourteenth Amendment claims in their Petition for Certiorari. Moreover, neither due process nor equal protection was mentioned in any of the various briefs filed in the case. Thus the true explanation for plaintiffs' failure to argue the Fourteenth Amendment claims to the Supreme Court is not that the Court is the master of its docket, but that plaintiffs never asked the Court to consider those claims.

Even upon their return to the district court to seek attorney's fees, plaintiffs failed to put any flesh on the bare bones allegations of their complaint. Their motion for fees states merely that their "complaint also alleges violations of the Equal Protection and Due Process Clauses and the Indian Commerce Clause." Plaintiffs' Motion for Award of Attorneys' Fees Pursuant to 42 U.S.C. § 1988, at 11. The district court awarded fees on the basis of the preemption claim without mentioning the Fourteenth Amendment claims. *See* Findings of Fact and Conclusions on the Plaintiffs' Motion for an Award of Attorneys' Fees Pursuant to 42 U.S.C. § 1988.

This is not a case where a § 1983 plaintiff seeks attorney's fees on the strength of constitutional claims which were pressed but not adjudicated because of "the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues." *Maher v. Gagne,* 448 U.S. at 133. Rather, this is a case where the constitutional claims were never pressed beyond the original federal complaint until they were dusted off for use in seeking a fee award under § 1988. For all practical purposes, plaintiffs abandoned their Fourteenth Amendment claims when, following the invocation of *Pullman* abstention by the district court, they failed to tender the claims to the state courts and the United States Supreme Court along with their preemption claim. In contrast, the pendent constitutional claims that provided the basis for a fee award in *Maher* were never abandoned and their substantiality was adjudicated by both the district court and the court of appeals. *See Gagne v. Maher,* 455 F. Supp. 1344, 1348 (D. Conn.), *aff'd,* 594 F.2d 336 (2nd Cir. 1978), *aff'd,* 448 U.S. 122 (1980).

Finally, and perhaps most troublesome, is plaintiffs' failure to take advantage of their opportunity in this court for further exposition of their constitutional claims. They provide us with no meaningful analysis; the sole authority relied upon is Justice Stevens' dissent in *White Mountain Apache Tribe v. Bracker,* 448 U.S. at 158, a reliance we find to be misplaced. In the first

place, plaintiffs mischaracterize Justice Stevens' dissent. They claim that he and Chief Justice Burger and Justice Rehnquist, who joined in the dissent, "felt that these state taxes *did violate* the due process and equal protection clauses". Appellees' Answering Brief, at 51 (emphasis added). All that Justice Stevens said was that *Pinetop*, as a private corporation doing business with an Indian Tribe, *"may well have* a right to be free from taxation as a matter of due process or equal protection," *Bracker*, 448 U.S. at 157 (Stevens, J., dissenting) (emphasis added), if the taxes burden a federal regulatory scheme and "there [is] no governmental interest on the State's part in imposing such a burden." *Id.* at 157. Indeed it would have been remarkable had Justice Stevens expressed the definitive opinion attributed to him by plaintiffs since preemption, not due process or equal protection, was the issue before the Court and the issue on which Justice Stevens disagreed with the majority. Justice Stevens' comments were clearly made solely for the purpose of contrast in the context of emphasizing that whatever valid grounds Pinetop might have had for challenging the state taxes, preemption was not one of them.

The second reason plaintiffs' reliance on Justice Stevens' dissent is misplaced is that the record leaves no room for doubt that Justice Stevens was not addressing the Fourteenth Amendment claims alleged in plaintiffs' federal complaint. Not only were those claims not before the Court in *Bracker*, which involved a review of the state court judgment, but also the dissent does not track the allegations of the federal complaint. Hence, whatever plaintiffs' constitutional theories might be, Justice Stevens was not addressing them. Justice Stevens speculated about conceivable constitutional claims that *Pinetop* as a private corporation might have, whereas the allegations in the complaint focus on the *Tribe's* status as a sovereign to enjoy treatment under Arizona tax laws on a par with the United States and other states. Perhaps more importantly, Justice Stevens was speculating on possible con-

stitutional implications of taxing vehicles used by Pinetop *solely* on private property, whereas the gravamen of plaintiffs' complaint is the state's failure to give plaintiffs beneficial treatment in *apportioning* the fuel use tax and motor carrier tax based upon travel on public and private roads within the state.[13] Moreover, while plaintiffs are correct in stating that Arizona's use fuel tax is levied "for the purpose of partially compensating the state for the use of its highways," Ariz. Rev. Stat. Ann. § 28-1552 (1976), they fail to point out that the tax is expressly levied "in lieu of" direct fuel taxes. Ariz. Rev. Stat. Ann. § 28-1554 (1976). As such, the use fuel tax is analytically indistinguishable from a direct fuel tax. We doubt that plaintiffs would seriously contend that Arizona can be forced to apportion direct fuel taxes collected at the pump.

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[13] The dissent overlooks this crucial distinction in concluding that the plaintiffs were treated differently from other similarly situated parties in the state because taxes were being imposed for vehicles used solely on private property. *Dissent*, at 15. In fact, the vehicles involved were operated on both public and private roads. *See Bracker*, 448 U.S. at 154 & n.3.

In pleading their Fourteenth Amendment claim, plaintiffs' allege that the Tribe and its partner Pinetop have a constitutional entitlement to be treated in the same manner as interstate truckers whose state fuel use taxes are apportioned to capture only that portion of fuel use actually attributable to travel on roads within the state. *See* note 10, *supra*. Thus, the Tribe contended that, for the purpose of the Arizona tax, tribal roads should be treated as though they were in a separate state. Arizona refused to do this, asserting that Pinetop's activities took place solely within Arizona and that Pinetop should be taxed in the same manner as are all other commercial entities that use vehicles on both public and private roads in Arizona. Thus, contrary to the dissent's assertions, plaintiffs were not "singled out" for disparate treatment and taxed "differently from other landowners in the State." *Dissent*, at 13 n.10. Rather, they were taxed in exactly the same fashion as all others who use both public and private roads within Arizona – without apportionment. The only exception was the United States Government, which was expressly exempted from the taxes. Ariz. Rev. Stat. § 40-641 (1982).

In conclusion, we hold on the basis of the record before us that the Fourteenth Amendment claims fail to meet the substantiality test of *Hagans v. Lavine* and have been asserted in this action at this late date "solely for the purpose of obtaining fees in [an action] where 'civil rights' of any kind are at best an afterthought." *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980) (Powell, J., dissenting).

B

Finally, plaintiffs' failure to present their Fourteenth Amendment claims to the state courts provides an alternate ground for rejecting them as a basis for awarding fees under § 1988. While we recognize that a federal plaintiff subject to *Pullman* abstention is not required to tender his federal claims to the state courts for adjudication, *see England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421 (1963), we know of no authority suggesting that a federal plaintiff may tender some federal claims while reserving others arising out of the same nucleus of operative facts.[14] While *England* carves out an exception to principles of res judicata in permitting a federal plaintiff to tender his pendent state claims to the state courts

[14] The state argues that the district court lacked jurisdiction over the issue of attorney's fees when plaintiffs presented their federal claims to the Arizona courts. The state relies on *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 421, where the Court determined that federal claims presented to the state court under a *Pullman* order may not be relitigated in federal court. *Id.* at 419. We believe, however, that *England* does not present a jurisdictional bar to these claims, but rather announces only a rule of res judicata. Thus, the district court was not deprived of subject matter jurisdiction to hear the fees claim. Because we hold that plaintiffs do not have a § 1983 claim to support an award of fees under § 1988, we need not decide whether the Tribe may return to federal court on their discrete claim for attorney's fees after submitting their preemption claims to the state courts. Nor need we decide whether the Tribe lacks standing to seek a fee award under § 1988 because it is not a "citizen" or "person" within the meaning of § 1983.

and return to federal court on his reserved federal claims in the event he fails to get adequate relief in the state action, we see no basis in law or logic for stretching that exception to permit him to reserve some of his federal claims while tendering others to the state courts for adjudication. Because plaintiffs would plainly have been barred by res judicata from returning to federal court to litigate its due process and equal protection claims had they failed to obtain a favorable state court judgment, we hold that plaintiffs may not use those claims as a basis for returning to federal court to seek a fee award under § 1988. For all practical purposes, plaintiffs abandoned their due process and equal protection claims when they failed to tender them to the state courts along with their preemption claim.

In sum, we hold that plaintiffs are not entitled to a fee award on the basis of the unadjudicated constitutional claims alleged in their federal complaint.

IV

The state also appeals from the district court order granting a declaratory judgment and a permanent injunction. Plaintiffs contend that the injunction and declaratory judgment were appropriate because the district court's findings reflected a sufficient threat that the state would impose the impermissible taxes even after the Supreme Court barred it from doing so in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

In the absence of a controversy "of sufficient immediacy and reality," *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941), a district court lacks jurisdiction to issue a declaratory judgment. *Sellers v. Regents of the University of California*, 432 F.2d 493, 499-500 (9th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971). Here, there is no evidence that state officials intend to ignore the Supreme Court's decision in *Bracker*. The record in fact contains evidence to the contrary.

After the Supreme Court's decision, the state filed an affidavit stating that it did not intend to impose any of the disputed taxes on Pinetop and the Tribe. We have no basis for presuming from this record that the Arizona officials will not honor a final state court judgment based upon a decision of the United States Supreme Court. We therefore hold that the district court erred in concluding that a controversy "of sufficient immediacy and reality" supported the issuance of a declaratory judgment against assessment of the taxes for the years covered by the Supreme Court's decision.

Plaintiffs further contend, however, that the district court properly entered a declaratory judgment on the merits covering the 1968-71 tax period, since assessments covering that period were never adjudicated by either the state courts or the Supreme Court. The state court tax refund action that ultimately reached the Supreme Court dealt only with taxes paid under protest after November 1971, and Pinetop and the Tribe argue that "each year is the origin of a new [tax] liability and a separate cause of action," *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948). They nevertheless concede that any attempt by the state to impose taxes covering the 1968-71 period would be thwarted by the doctrine of collateral estoppel. Appellees' Answering Brief at 27. *See Montana v. United States*, 440 U.S. 147 (1979). We thus see no justification at this time for entering a declaratory judgment on the merits or granting injunctive relief covering the 1968-71 period.

REVERSED.

WHITE MOUNTAIN APACHE TRIBE v. WILLIAMS,
No. 81-5348
FLETCHER, Circuit Judge, Dissenting:

I respectfully dissent.

There are three separate and independent bases to support the district court's award of attorney's fees to the Tribe under 42 U.S.C. § 1988 (1982). The Tribe has raised civil rights claims under 42 U.S.C. § 1983 (1982) sufficient to support the section 1988 award based upon (1) Arizona's alleged violations of the federal laws regulating the harvest and sale of reservation timber, 25 U.S.C. §§ 406-407, 466 (1982); (2) its alleged due process violations; and (3) its alleged equal protection violations by the state.

The Tribe raised these claims in its district court complaint;[1] they "aris[e] out of a 'common nucleus of operative fact'" along with the preemption claim upon which the Tribe prevailed in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); the Tribe has never abandoned them. H.R. Rep.

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[1] The majority maintains that "[t]he Tribe has never contended and no court has ever found that the[ ] statutes [regulating Indian reservation-timber] were ever violated." Majority Opinion at ____ n.8. However, the Tribe explicitly alleges in its complaint that "[t]he taxes and regulations attempted to be imposed by the State of Arizona are *in direct contravention* of the stated objectives of [the] Federal regulations" that were promulgated by the Secretary in order to fulfill his trust responsibilities under the reservation-timber laws. First Amended Complaint, § XXVII (emphasis added). Moreover, the Supreme Court expressly stated in *Bracker* that "the [Arizona] taxes would *threaten the overriding federal objective*" and "would *undermine [th[e] policy*" for which the reservation-timber laws were enacted. *Bracker*, 448 U.S. at 149 (emphasis added). Thus, the Tribe has alleged, and the Supreme Court has strongly suggested, that the imposition of the challenged Arizona taxes "violat[ed] . . . *rights created by federal statutes,*" as would be required to establish a section 1983 claim based on sections 406, 407, and 466 of the reservation-timber laws. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 19 (1981) (emphasis added).

No. 1558, 94th Cong., 2d Sess. 4 n.7 (1976) (quoting *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966)); *see Maher v. Gagne,* 448 U.S. 122, 132 n.15 (1980)(quoting the House Report); *Southeast Legal Defense Group v. Adams,* 657 F.2d 1118, 1124-25 (9th Cir. 1981); *see also Smith v. Robinson,* 468 U.S. 992, 104 S. Ct. 3457, 3464 (1984). I find that the Tribe's claim based on the federal reservation-timber laws is meritorious, and I find that its due process and equal protection claims satisfy the "substantiality" test of *Hagans v. Lavine,* 415 U.S. 528 (1974).[2] Moreover, I conclude that

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[2] In determining whether the Tribe's section 1983 claims support an award of section 1988 attorney's fees, the standards for evaluating claims based on alleged violations of federal statutes and claims based on alleged constitutional violations appear to be different. The legislative history of section 1988 provides that:

> [when] a plaintiff joins a claim under one of the statutes enumerated in [section 1988, for which attorney's fees are available,] with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, *is entitled to a determination on the other claim for the purpose of awarding counsel fees.* In some instances, however, the claim with fees may involve a *constitutional question* which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *In such cases,* if the claim for which fees may be awarded meets the "substantiality" test [enunciated in] *Hagans v. Lavine* [, 415 U.S. 528 (1974),] attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact."

H.R. Rep. No. 1588, 94th Cong., 2d Sess. 4 n.7 (1976) (citations omitted and emphasis added), *quoted in Maher v. Gagne,* 448 U.S. 122, 132 n.15 (1980).

This language appears to suggest that for the Tribe to recover section 1988 attorney's fees based on its claims relating to the reservation-timber statutes, those claims must be determined to be meritorious, whereas to recover based on its constitutional due process and equal protection

the Tribe has the capacity to bring a section 1983 action in federal court to vindicate these claims.[3] Therefore, based upon the legislative history of section 1988 and the Supreme Court's decision in *Maher v. Gagne*, 448 U.S. 122 (1980), I conclude that each of the Tribe's section 1983 claims is sufficient to justify the district court's award of attorney's fees. *See* H.R. Rep. No. 1558, *supra*, at 4 n.7; *Maher*, 448 U.S. at 132 n.15 (quoting House Report); *Jensen v. Stangel*, No. 83-2473, slip op. at 4 (9th Cir. May 21, 1986) (concluding that Congress intended "a liberal construction of section 1988 to achieve the purpose of encouraging compliance with and enforcement of the civil rights laws").

A. The Tribe's Failure to Litigate Its Section 1983 Claims in Bracker

The majority contends that because the Tribe failed to litigate its section 1983 claims before the Arizona state courts and the United States Supreme Court in the *Bracker* case after

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2 Cont.
claims, those claims merely must be found to be *"substantial,"* or non-frivolous. *See Hagans*, 415 U.S. at 537-38 (defining "substantiality" of claims); *see also* Section C, *infra*. Because I conclude that the Tribe's claim based on the reservation-timber statutes is meritorious, I need not decide whether a different standard applies in awarding fees for the Tribe's two different types of section 1983 claims. I find that any of the Tribe's three section 1983 claims independently supports the district court's award of attorney's fees.

[3] Because I reject the majority's conclusions that the Tribe's section 1983 claims are procedurally barred and are either non-meritorious or frivolous, I am required to address two issues that the majority is not required to resolve. First, I must determine whether, under the circumstances involved in this case, the Tribe qualifies as a "citizen" or "person" entitled to bring an action under Section 1983. I conclude that it does. *See* Section D, *infra*. Second, I must determine whether the Tribe's present section 1983 action can be brought in federal court under the "Indian tribes" exception to the Tax Anti-Injunction Act, 28 U.S.C. § 1341 (1982). I conclude that it can. *See id.*

the district court entered its *Pullman* abstention order, the Tribe effectively "abandoned" those claims for purposes of this case. Such a conclusion is contrary to the Supreme Court's decision in *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1963), and to our court's decision in *Tovar v. Billmeyer,* 609 F.2d 1291 (9th Cir. 1979).

In *England,* the supreme Court provided that in cases where a federal district court enters an abstention order, "*[i]f a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there,* then . . . he has elected to forgo his right to return to the District Court." *England,* 375 U.S. at 419 (emphasis added). In the case before us, after the district court entered its abstention order, the Tribe did not submit its section 1983 claims for decision to the Arizona state courts or the United States Supreme Court, did not litigate them in those courts, and did not have them decided there. *See White Mountain Apache Tribe v. Bracker,* 120 Ariz. 282, 585 P.2d 891, 893-900 (Ariz. Ct. App. 1978), *rev'd,* 448 U.S. 126 (1980); *Bracker,* 448 U.S. at 138. The Tribe preserved its section 1983 claims, and cannot be found to have abandoned them.

Our court stated in *Tovar* that "*[a] free and unreserved submission to the state court of all federal claims for complete and final resolution is necessary to bar return to the federal court,*" *Tovar,* 609 F.2d at 1294 (emphasis added). The majority itself concedes that the Tribe never freely submitted its section 1983 claims for resolution in the *Bracker* case.[4] Thus, these claims were properly before the district court when it awarded section 1988 attorney's fees.

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[4] The majority asserts that although *England* creates an exception to traditional res judicata principles, it is essentially an all-or-nothing proposition: parties, like the Tribe, may not raise some, but not all, of their federal claims in state court while reserving their remaining federal claims. No such requirement has ever been imposed under the *England* doctrine.

B. The Tribe's Section 1983 Claim Based Upon the Indian Reservation Timber Laws

The majority maintains that even if the Tribe's claims were properly before the district court, violations of the federal laws regulating the harvest and sale of reservation timber, such as those alleged by the Tribe in this case, cannot give rise to a civil rights action under section 1983. I disagree. Section 1983 provides a cause of action for state officials' violations of federal statutes whenever (1) the statutes create "enforceable rights," and (2) Congress did not, in the statutes themselves, foreclose private enforcement of those rights through a section 1983 action. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 18 (1981); *accord Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981); *Almond Hill School v. United States Department of Agriculture*, 768 F.2d 1030, 1035 (9th Cir. 1985); *Keaukaha-Panaewa Community Association v. Hawaii Homes Commission*, 739 F.2d 1467, 1470 (9th Cir. 1984). I conclude that both these requirements are satisfied

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4 Cont.

We stated in *Tovar* that "[a] free and unreserved submission of *all* federal claims . . . is necessary to bar return to the federal court." 609 F.2d at 1294 (emphasis added). The word "all" would be superfluous if the majority's interpretation of *England* were correct.

The majority also criticizes the Tribe for maintaining that its failure to raise its fourteenth amendment claims before the Supreme Court was due to the limited nature of the Court's order granting certiorari in *Bracker*. Majority opinion at ____. This issue is irrelevant to the disposition of the present case. The Tribe did not litigate its fourteenth amendment claims in the Arizona state courts, and therefore could not have raised them in the *Bracker* appeal. Yet, as noted above, based upon the decisions in *England* and *Tovar*, this tactical decision by the Tribe does not preclude it from relying on those claims as a basis for section 1988 attorney's fees in the present action.

in respect to sections 406, 407, and 466, and that the Tribe is therefore entitled to vindicate its rights under these provisions in a section 1983 action. I further conclude, based upon the Supreme Court's opinion in *Bracker*, that the Tribe's section 1983 claim under these provisions is meritorious.

As the majority acknowledges, sections 406, 407, and 466 require the Secretary of the Interior to manage tribal timber resources based "upon a consideration of the needs and best interests" of the tribe, and to ensure that proceeds from any timber sales be paid to the tribe "or disposed of for [its] benefit," subject only to limited deductions for "administrative expenses" incurred by the federal government. 25 U.S.C. §§ 406(a), 413; 25 C.F.R. § 163.18 (1985); *see United States v. Mitchell*, 463 U.S. 206, 222 n.23, 224 (1983); *Bracker*, 448 U.S. at 145-47 & nn. 12-13, 149 (citation omitted); *Short v. United States*, 719 F.2d 1133, 1135-36 (Fed. Cir. 1983), *cert. denied*, 104 S. Ct. 3545 (1984). The purpose of these provisions is to ensure that tribes receive "'the benefit of whatever profit [the forest] is capable of yielding,'" *Bracker*, 448 U.S. at 147, 149 (citation omitted); *accord Mitchell*, 463 U.S. at 221-22, and to provide that tribal timberlands be managed "'so as to obtain the greatest revenue for . . . Indians consistent with a proper protection and improvement of the forests.'" *Mitchell*, 463 U.S. at 224 (quoting U.S. Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911)). The Supreme Court recently held, based largely upon its decision in *Bracker*, that these provisions establish a trust relationship between the federal government and tribes with timberlands on their reservations, and that they establish a "substantive right enforceable [by tribes] against the United States for money damages" under the Tucker Act if the federal government

breaches its fiduciary duties.[5] *Mitchell*, 463 U.S. at 216-18, 224, 226; *accord Short*, 719 F.2d at 1134-35 (interpreting *Mitchell* to cover both allotted and unallotted lands).

Our court recently held that a federal act establishing a land trust for the betterment of native Hawaiians created rights enforceable by those individuals under section 1983 against parties who interfere with or deprive them of their rights or benefits under the trust.[6] *Keaukaha-Panaewa*, 739

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[5] The Court's conclusion in *Mitchell* that sections 406, 407, and 466 create a trust relationship between tribes and the federal government was foreshadowed in *Bracker*, where the Court not only suggested that such a trust relationship existed, but also concluded that Arizona's challenged taxes interfered with the Tribe's rights under that trust relationship:

> [T]he [challenged] taxes would threaten the overriding federal objective of guaranteeing Indians that they will "receive the . . . benefit of whatever profit [the forest] is capable of yielding . . ." 25 C.F.R. § 141.3(a) (3) (1979). Underlying the federal regulatory program rests a policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe, subject only to administrative expenses incurred by the federal government. That objective is part of the general federal policy of encouraging Tribes "to revitalize their self-government" and to assume control over their "business and economic affairs." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 151. The imposition of the taxes at issue would undermine that policy in a context in which the federal government has expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber.

Bracker, 448 U.S. at 149.

[6] The act at issue in *Keaukaha-Panaewa*, the Hawaiian Admission Act, Public Law No. 86-3, 73 Stat. 4 (1959), required that lands originally held by the United States in trust for native Hawaiians be maintained "as a public trust . . . for the betterment of the conditions of native Hawaiians . . . and their use for any other object shall constitute a breach of trust." Hawaiian Admission Act, § 5(f); *see Keaukaha-Panaewa*, 739

F.2d at 1471-72. Similarly, the Eighth Circuit has held that interference by state or local officials with the rights of Indians who place their lands in trust with the federal government under 25 U.S.C. § 465 (1982)[7] provides a basis for those Indians to bring section 1983 claims. *See Chase v. McMasters,* 573 F.2d 1011, 1017 (8th Cir.), *cert. denied,* 439 U.S. 965 (1978). Based upon these decisions and the Supreme Court's analysis in *Mitchell,* I conclude that by establishing a trust relationship between Indian tribes and the federal government, sections 406, 407, and 466 create rights that tribes who are deprived of their trust benefits or whose trust relationships are disrupted can enforce under 1983.[8]

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6 Cont.

F.2d at 1469. Thus, the general terms and purposes of the Hawaiian trust are fairly similar to the terms and purposes of the trust for Indian timberlands identified by the Supreme Court in *Mitchell* and *Bracker. See Mitchell,* 463 U.S. at 219-25; *Bracker,* 448 U.S. at 149 (federal management of tribal timberlands is designed to "encourag[e] tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs' ") (citation omitted).

[7] Section 465 authorizes Indians or Indian tribes to convey their lands in trust to the Secretary of the Interior in order to avoid state and local property taxes. *See* 25 U.S.C. § 465; *Chase v. McMasters,* 573 F.2d 1011, 1014-16 (8th Cir.), *cert. denied,* 439 U.S. 965 (1978).

[8] The majority's conclusion that the "regulatory legislation involved in this case is analogous to that involved in *Boatowners [and Tenants Association, Inc. v. Port of Seattle,* 716 F.2d 669 (1983),] where [this court] also found no 'enforceable rights,' " majority opinion at ____, is plainly unsupported by a comparison of *Boatowners* and *Mitchell.* In *Boatowners,* we found that the

> language and legislative history [of the statute at issue, the River and Harbor Improvements Act, 33 U.S.C. §§ 540-633 (1982),] indicate an intent to improve navigation, enhance commerce, and reduce vehicle-vessel traffic problems, all to *the benefit of the general public.* There is *no evidence* whatsoever of an intent to provide economical moorage or to create

I also conclude that Congress did not intend to foreclose private enforcement under section 1983 of the rights it created for Indian tribes in sections 406, 407 and 466. We have held that "there is a presumption that a federal statute creating enforceable rights *may* be enforced in a section 1983 action," and that the burden is on the "governmental defendant [to] show that Congress intended the federal statute in question to provide the exclusive remedy." *Keaukaha-Panaewa*, 739 F.2d at 1470-71 (emphasis added and citations omitted); *accord Almond Hill Schooi*, 768 F.2d at 1035. The text of sections 406, 407 and 466 does not suggest that Congress intended to preclude a section 1983 remedy. The three provisions do not include a "comprehensive enforcement scheme" with a "'balance, completeness and structural integrity' that would suggest remedial exclusivity," *Middlesex*, 453 U.S. at 20; *Almond Hill School*, 768 F.2d at 1035-36 (citations omitted); *Keaukaha-Panaewa*, 739 F.2d at 1471; *Department of Education, State of Hawaii v. Katherine D.*, 727 F.2d 809, 820 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 2360 (1985), nor do they provide remedies that are inconsistent with those available under section 1983. *See Almond Hill School*, 768 F.2d at 1035-36; *Keaukaha-Panaewa*, 739 F.2d at 1471; *Katherine D.*, 727 F.2d at 820.

On the contrary, these provisions do not explicitly mention any remedies at all – the damages remedy against the federal government for breach of fiduciary duty that the Supreme Court recognized in *Mitchell* was based upon *inferences* the

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any *special benefit for the class of pleasure craft owners.* BOATA thus has no enforceable rights under the Act.

Boatowners, 716 F.2d at 673-74 (emphasis added). In contrast, the Supreme Court concluded in *Mitchell* that sections 406, 407, and 466 were designed specifically to benefit Indians and Indian tribes and created a trust relationship in which these groups were the beneficiaries. *Mitchell*, 463 U.S. at 222-25.

Court drew from the provisions' structure and legislative history. *See* 25 U.S.C. §§ 406, 407, 466; *Mitchell*, 463 U.S. at 218, 224-27. Even assuming that Congress specifically contemplated a Tucker Act remedy when it adopted the three provisions, we have held that a federal act providing only a single, limited remedy "does not contain a sufficiently comprehensive enforcement scheme to foreclose a section 1983 remedy." *Keaukaha-Panaewa*, 739 F.2d at 1471; *see also Almond Hill School*, 768 F.2d at 1036-37; *cf. Maine v. Thiboutot*, 448 U.S. 1, 66 (1980) (authorizing section 1983 action to enforce Social Security Act where only a single, limited remedy was expressly provided under the Act). Moreover, as the present case illustrates, limiting Indian tribes whose reservations contain timberlands to the sole remedy recognized in *Mitchell* would deny them any redress whatsoever against state officials who interfere with the trust relationship created by sections 406, 407 and 466 and who attempt to deny tribes the benefits to which these provisions entitle them. I therefore conclude, based upon the lack of any explicitly delineated remedies in sections 406, 407, and 466 and based upon the legislative history and background of the three provisions, that Congress did not intend to foreclose private enforcement of these provisions under section 1983.

Since both conditions required by the Supreme Court for establishing the availability of a section 1983 cause of action are satisfied, I conclude that the Tribe was entitled to enforce its section 406, 407, and 466 rights against the defendants in a section 1983 action. *See Middlesex*, 453 U.S. at 19. Moreover, in light of the Supreme Court's decision in *Bracker*, I conclude that the Tribe's section 1983 claims based upon these three provisions are meritorious. The Court stated in *Bracker* that "the [challenged Arizona] taxes would threaten the overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding.'" *Bracker*, 448 U.S. at 149 (citations omitted). It

stated that "[t]he imposition of the taxes at issue would undermine" the "policy of assuring that the profits derived from timber sales will inure to the benefit of the Tribe, subject only to administrative expenses incurred by the Federal Government." *Id.* (citations omitted). Thus, the Supreme Court found that the challenged Arizona taxes deprive the Tribe of the central benefit guaranteed to it in its trust relationship with the federal government under sections 406, 407, and 466. *See Mitchell,* 463 U.S. at 221-24. I therefore conclude that the Tribe would prevail on its section 1983 claim based on those three provisions.

C. The Tribe's Section 1983 Claims Based on Due Process and Equal Protection

The majority asserts that the Tribe's due process and equal protection claims are frivolous, "difficult to take . . . seiously." and so "insubstantial" that they will not support an attorney's fees award under section 1988. It concludes that even if these claims were properly before the district court, they do not satisfy the "substantiality test" of *Hagans v. Lavine,* 415 U.S. 528 (1974).[9] I disagree. The Supreme Court provided in *Hagans* that

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[9] The majority states that the Tribe's allegations concerning its fourteenth amendment claims in its complaint are "far too meager" for this court to determine whether or not they satisfy the *Hagans* "substantiality" test and support the district court's award of attorney's fees. Majority opinion at ____. I do not agree. While the Tribe's presentation of these claims in its complaint and subsequent pleadings has not been especially detailed, a reading of the Tribe's pleadings, along with the Supreme Court's opinions in *Bracker* and recent due process and equal protection cases, makes it clear that the Tribe's fourteenth amendment claims satisfy the *Hagans* test.

However, given that the majority believes that it has no "meaningful basis for determining whether [the Tribe's] fourteenth amendment claims . . . support a fee award under § 1988," majority opinion at ____,

> claims are constitutionally insubstantial only if . . . prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial . . . . A claim is insubstantial only if "'its unsoundness so clearly results from . . . previous decisions . . . as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'"

Hagans, 415 U.S. at 537-38 (quoting *Goosby v. Osser*, 409 U.S. 512, 518 (1973)) (citations omitted and emphasis added.)[10] I conclude that the Tribe's due process and equal protection claims are not insubstantial or frivolous under *Hagans'* defini-

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I find it inexplicable that the majority does not remand this case for further development on this issue. Instead, the majority has simply discarded a considered fee-award judgment by the district court and vacated a $206,000 award to the Tribe.

The majority states that the district court awarded attorney's fees based exclusively on the Tribe's preemption claim and "did not [even] mention the [Tribe's] constitutional claims in making its fee award," majority opinion at ____, but this is simply not true. The district court's findings and conclusions on the Tribe's section 1988 request plainly state that the court awarded attorney's fees based on all the Tribe's section 1983 claims. The court did not single out any one claim for special mention. Even if the district court's award had been based on the Tribe's preemption claim, we are required to affirm the award as long as the Tribe's section 1983 claims based on the Indian timber laws are meritorious or its fourteenth amendment claims are not frivolous.

10 Although purporting to apply the *Hagans* test in evaluating the district court's fee award, the majority quesions whether the Tribe's fourteenth amendment claims have "sufficient merit" to justify a section 1988 award. This suggests that the majority has applied too strict a standard in reviewing the Tribe's fourteenth amendment claims, and has not simply examined whether those claims are "inescapably . . . frivolous," as *Hagans* requires. *Hagans*, 415 U.S. at 537-38.

tion, and therefore support the district court's award of attorney's fees under section 1988. *See Maher*, 448 U.S. at 132 n.15.

The dissenting opinion in *Bracker*, 448 U.S. at 153 (Stevens, J., dissenting), subscribed to by three Justices, concluded that the Tribe and "Pinetop may well have a right to be free from [the challenged Arizona] taxation as a matter of due process or equal protection." *Id.* at 158 & n.7.[11] It seems unlikely that

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[11] The majority contends that the statements in the *Bracker* dissent concerning possible due process and equal protection claims arising out of the challenged Arizona taxes do not support the Tribe's fourteenth amendment claims, because these statements refer to claims potentially available to "Pinetop as a private corporation rather than to claims potentially available to the Tribe." Majority opinion at ____. The majority maintains that the Tribe's fourteenth amendment claims, in contrast to Pinetop's, arise out of the Tribe's "status as a sovereign" and are based on the assumption that the Tribe is entitled to receive "beneficial [or preferential] treatment" above and beyond that of other individuals and entities *Id.*

However, the majority has misinterpreted the Tribe's due process and equal protection claims and has confused them with the preemption claim it advanced in *Bracker*. Although the underlying premise of the Tribe's preemption claim in *Bracker* was that the State must accord *special* treatment to the Tribe's timberlands and cannot regulate them to the same extent as it regulates other timberlands, *see generally Bracker*, 448 U.S. at 445-53, the Tribe's fourteenth amendment claims in this action are based on the allegation that Arizona has impermissibly discriminated against the Tribe and singled it out by taxing it *differently* from other landowners in the state without any apparent rational justification.

The Tribe has raised its fourteenth amendment claims in its capacity as a corporation seeking to make commercial use of its reservation lands. *See* Section D, *infra*. Its due process and equal protection claims are identical to those that any corporate entity would raise if it were treated disparately under a state taxing scheme. These claims have nothing to do with the Tribe's status as a sovereign entity. They arise out of the Tribe's joint commercial venture with Pinetop, *see id.*, and are therefore identical to any fourteenth amendment claims that Pinetop would be entitled to raise as a corporation. Therefore, any statements in the *Bracker* dissent relating to possible due process and equal protection claims available to Pinetop would be equally applicable to the Tribe.

one-third of the Supreme Court would make such a statement if, as the majority suggests, previous "'decisions . . . leave no room for the inference that the questions [involved can] be the subject of controversy.'" *Hagans*, 415 U.S. at 538 (citations omitted).

The majority opinion in *Bracker* demonstrates that all the necessary elements are present for the Tribe, acting in its corporate capacity,[12] to raise viable due process and equal protection challenges to Arizona's vehicle taxes. First, the *Bracker* majority noted that "it is undisputed that the economic burden of the asserted taxes will ultimately fall on the Tribe." *Bracker*, 448 U.S. at 151. Thus, the Tribe has standing to challenge the Arizona taxes and has alleged that imposition of these taxes deprived it of property under the fourteenth amendment. *See Warth v. Seldin*, 422 U.S. 490, 498-99 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972).

Second, Arizona conceded during oral argument in *Bracker* that its taxes do not apply to the use of vehicles on private roads and property in the state. *Bracker*, 448 U.S. at 154-55 & nn.3-4 (Stevens, J., dissenting) (quoting Supreme Court transcript); *see also id.* at 148 n.14. Yet the *Bracker* majority found that Arizona had taxed the use of vehicles by the Tribe and Pinetop in operations "conducted solely on the Fort Apache Reservation" and on roads that were "built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors." *Id.* at 150. Thus, Arizona treated the Tribe differently from other, similarly situated parties in the state who operate vehicles on non-state maintained roads and private property.[13]

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[12] *See* the discussion relating to the Tribe's corporate or propriety capacity in Section D, *infra*.

[13] The majority asserts that the challenged Arizona taxes are typically assessed "without apportionment" between mileage driven on state-

13 Cont.
maintained roads and non-state-maintained roads for entities or landowners based in Arizona. Majority opinion at ____ n.13. Thus, according to the majority, the Tribe is not entitled under Arizona law to have the taxes chargeable to its and Pinetop's timber operations apportioned, and its demand for tax apportionment in its complaint represents a request for *preferential treatment,* as opposed to *equal protection. Id.* The majority interprets the Tribe's equal protection claim as alleging that the Tribe and Pinetop are constitutionally entitled to be treated "in the same manner as interstate truckers" passing through Arizona, and that the "tribal roads [on its reservation] should be treated as though they [are] in a separate state." *Id.*

However, the majority has misinterpreted the challenged Arizona taxing scheme, and oversimplified the Tribe's equal protection claim. Contrary to the majority's assertion, Arizona's fuel taxes are assessed for in-state taxpayers based upon the types of roads on which they use their vehicles. Section 28-1552 provides that "an excise tax [shall be] imposed [at the rate of eight cents per gallon] *on use fuel used* in the propulsion of a motor vehicle *on any highway* within this state." Ariz. Rev. Stat. Ann. § 28-1552 (1985) (emphasis added); *see Bracker,* 448 U.S. at 139-40. Thus, according to the plain terms of this and other provisions, Arizona's use fuel tax is imposed only for gasoline used by taxpayers to travel on state-maintained highways – it is not assessed based upon their total mileage during the year. *See* Ariz. Rev. Stat. Ann. §§ 28-1551(4) (1985) (defining "highway" to mean only those roads *"open to the use of the public"*), § 28-1578 (authorizing refund of use fuel tax to "[a]ny person who purchases tax paid use fuel and . . . uses it in this state for purposes *other than to propel a motor vehicle upon the highways of this state")* (emphasis added); *see also* Ariz. Stat. Ann. §§ 28-1555(B) (1) (taxpayers can obtain written authorization not to pay use fuel tax to vendors and instead to self-assess tax if they "operate a motor vehicle [either] within and without this state or *on and off the highways of this state"*), § 28-1556 (establishing *rebuttable presumption* that all fuel inserted into a vehicle's gas tank is "consumed in propelling the vehicle *on the highways of this state"*) (emphasis added).

Moreover, Arizona's assistant attorney general made a series of statements and concessions during the Supreme Court argument in *Bracker* indicating that Arizona apportions mileage when assessing its challenged taxes. He stated initially that "'so long as road[s] remain [ ] private thoroughfare[s, the] use of those road[s] would not be subject to the

13 Cont.

State tax.'" *Bracker*, 448 U.S. at 154 n.3 (Stevens, J., dissenting) (quoting Assistant Attorney General Macpherson). Yet, if the majority's interpretation of the Arizona tax statutes is correct, taxpayers would not be permitted to apportion their taxes based upon their relative use of state highways and other roads, and their use of "private thoroughfare[s]" would be taxed so long as they also used state highways at some point during the year. Furthermore, Arizona conceded during the Supreme Court argument that it did not intend to "tax use on . . . tribal roads" regardless of the state courts' prior decisions on the matter, and the Tribe's attorney welcomed this concession. *Id.* at 154-56 & n.4 (Stevens, J., dissenting) (quoting attorneys Macpherson and Wake); *see id.* at 148 n.14. This concession would have been meaningless if, as the majority contends, Arizona's taxes were determined without apportionment, because the Tribe admitted that it and Pinetop used state highways and B.I.A. roads in their operations. *Id.* at 154 n.2 (Stevens, J., dissenting). The three Justices dissenting in *Bracker* expressly noted that Arizona's concessions regarding tribal and private roads would reduce the taxes owed by Pinetop and the Tribe: thus, they expressly interpreted the Arizona statutes to authorize apportionment of mileage in determining the amount of taxes owed. *See id.* at 159 & n.8 (Stevens, J., dissenting). For all these reasons, it seems clear that Arizona assesses at least some of its challenged taxes based upon the road-use of the individual taxpayer.

The Tribe's equal protection claim in this action arises out of Arizona's refusal to apportion the Tribe's and Pinetop's mileage in assessing their fuel taxes, even though it apportions mileage for "other operations that occur in part over state roads and part over non-state roads." First Amended Complaint, Paragraph XXIII. Despite the majority's claims, these "other operations" include Arizona-based as well as non-Arizona-based individuals and entities. The subsequent reference in the Tribe's complaint to "carriers that operate [only] partly in the State of Arizona," upon which the majority relies, does not signify that the Tribe's equal protection claim is entirely premised upon the treatment received by "interstate truckers," as the majority contends – it merely states an alternative equal protection argument. *See id.*

Finally, the *Bracker* majority reiterated throughout its opinion that the State of Arizona is "unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau [of Indian Affairs] and tribal roads within the reservation." *Id.* at 148-49, 150-51. This suggests that there may well be no rational basis for or legitimate purpose furthered by Arizona's disparate treatment of the Tribe and other parties. *See Williams v. Vermont*, 105 S. Ct. 2465, 2472 (1985); *Metropolitan Life Insurance Co. v. Ward*, 105 S. Ct. 1676, 1683 (1985). Thus, the *Bracker* majority concluded that imposition of the challenged Arizona taxes deprived the Tribe of property, that in imposing these taxes, Arizona treated the Tribe differently from other, similarly situated entities, and that Arizona has failed to identify any rational basis for doing so. I conclude, as a result, that the due process and equal protection claims raised by the Tribe are not frivolous or foreclosed by prior decisions, and therefore support the district court's award of section 1988 attorney's fees.[14] *See, e.g., Williams*, 105 S. Ct. at 1679-84.

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[14] The majority asserts that because the challenged Arizona use fuel tax "is expressly levied 'in lieu of' direct fuel taxes," it is therefore "analytically indistinguishable from a direct fuel tax." The majority contends as a result that the Tribe cannot challenge Arizona's unequal imposition of the use fuel tax, because it could "not seriously contend that Arizona should be forced to apportion direct fuel taxes collected at the pump." Majority opinion at _____ .

This argument is seriously flawed. The fact that a state can conceivably tax an individual or entity under one tax scheme does not automatically entitle it to impose taxes upon that individual or entity under a different tax scheme when other similarly situated individuals or entities are not being taxed under that scheme. Otherwise, there could never be due process or equal protection challenges to state taxing schemes, because it would always be possible to hypothesize situations in which the victims or alleged discriminatory treatment could be taxed.

D. The Tribe's Capacity To Bring A Section 1983 Action In Federal Court

Since the Tribe has asserted viable section 1983 claims based upon the Indian reservation timber laws and the due process and equal protection clauses, it is entitled to recover section 1988 attorney's fees if (1) it has the capacity to bring a section 1983 action based on those claims; and (2) such an action is not barred in the federal courts by the Tax Anti-Injunction Act, 28 U.S.C. § 1341 (1982).[15] Although not every action by an Indian tribe challenging the imposition of state taxes will satisfy these two requirements, I conclude, based on the circumstances of this case and the capacity in which the Tribe initiated this litigation, that the present action satisfies both requirements,

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14 Cont.

Arizona chose to adopt its use fuel tax. It is responsible for administering that tax in an evenhanded, non-discriminatory fashion that will withstand due process and equal protection scrutiny. If Arizona chooses to change to a direct fuel tax so that it can tax the Tribe and other private landowners for fuel used on non-state-maintained roads and private property, it certainly would be entitled to do so. However, the fact that Arizona could conceivably change its tax system does not affect the resolution of this case.

15 The Tax Anti-Injunction Act provides that:

> [Federal] district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341. Courts have recognized a limited exception to this provision for "Indian Tribes." *See Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 462-75 (1976); *see also* Section D, *infra*. Since the Anti-Injunction Act applies only to actions brought in *federal court*, had the Tribe chosen to raise its section 1983 claims in its parallel state-court action, section 1341 would not have served as a bar to its section 1983 claims.

and that the Tribe is entitled to recover section 1988 attorney's fees.[16]

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[16] A tribe's ability to bring an action in federal court challenging the imposition of state taxes depends on the capacity in which the tribe initiates the litigation and the basis of the tribe's standing to bring such a challenge. The Supreme Court indicated in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), that in actions involving challenges to the imposition of state taxes, the source of parties' standing to bring the actions must coincide with the basis on which subject-matter jurisdiction is asserted. *See id.* at 468 n.7.

In the present action, the Tribe's standing is based upon its proprietary, corporate activities; as a result, in order to maintain its action, the Tribe must be entitled to bring a section 1983 action and must qualify for the "Indian tribes" exception to section 1341 while acting in its corporate capacity. The Tribe could also have challenged Arizona's taxes in its sovereign, governmental capacity, if the imposition of those taxes adversely affected its exercise of its powers of self-government, or if the taxes were imposed on the Tribe's governmental operations. *See id.; see also Assiniboine & Sioux Tribes v. Montana*, 568 F.Supp. 269, 276 (D.Mont.1983) (tribal vehicles had to be taxed for Tribe to have standing to seek refund under *Moe*). Such an action would clearly not be barred by section 1341. *See, e.g., Moe*, 425 U.S. at 474-75. However, it is doubtful whether the Tribe qua sovereign would qualify as a "citizen of the United States or other person" eligible to bring an action under section 1983 for deprivation of its rights, privileges, or immunities. *See City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1253-55 (5th Cir. 1976) (municipality is not a "person" entitled to bring section 1983 action); *Buda v. Saxbe*, 406 F.Supp. 399, 403 (E.D.Tenn. 1974) (a "state is not a '. . . citizen of the United States or other person within the jurisdiction thereof . . .' within the contemplation of 42 U.S.C. § 1983."); *Spence v. Boston Edison Co.*, 390 Mass. 604, 459 N.E.2d 80, 83-84 (1983) (city housing authority cannot bring section 1983 action to enforce due process or equal protection rights); *see also City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 233 (9th Cir.) ("'[p]olitical subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment."), *cert. denied*, 449 U.S. 1039 (1980).

Similarly, the Tribe could have brought an action challenging Arizona's vehicle taxes as a representative of or as *parens patriae* for its individual

16 Cont.

members, in order to vindicate their individual rights. *See, e.g., Assiniboine & Sioux Tribes*, 568 F.Supp. at 277; *see also Little Earth of United Tribes, Inc. v. United States Deparment of Housing and Urban Development*, 584 F.Supp. 1292, 1295-97 (D.Minn. 1983). When acting solely in a representative capacity, a tribe's standing is based exclusively upon the standing of its individual members: the tribe simply raises claims that its members could raise individually, and essentially stands in the same position as they would, had they brought the action collectively. *See International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock*, No. 84-1777, slip op. at____ (S.Ct. June 25, 1986); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977); *United States v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)*, 412 U.S. 669, 683-90 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 735-39 (1972); *see also Assiniboine & Sioux Tribes*, 568 F.Supp. at 277. Thus, the Tribe would clearly be entitled to bring a section 1983 action based upon alleged violations of its members' due process and equal protection rights, or their rights under the Indian reservation timber laws. *See, e.g., Thompson v. New York*, 487 F.Supp. 212, 216 (N.D.N.Y. 1979) (individual Indians can maintain section 1983 actions based on alleged violations of their equal protection rights).

However, it would appear inconsistent with our prior decisions to allow tribes suing merely as representatives of their individual members to avoid the bar of section 1341. We have held that the "Indian tribes" exception to section 1341 does not apply to suits brought by individual Indians, *see Comenout v. Washington*, 722 F.2d 574, 577 (9th Cir. 1983); *Dillon v. Montana*, 634 F.2d 463, 469 (9th Cir. 1980), or by Indian entities that are less than full-scale "Indian tribe[s] or band[s]," as that phrase is used in 28 U.S.C. § 1362 (1982). *See Navajo Tribal Utility Authority v. Arizona Department of Revenue*, 608 F.2d 1228, 1231 (9th Cir. 1979). In light of these decisions, authorizing Indian tribes to bring representative actions in federal court challenging the collection of state taxes on behalf of their members would undermine and perhaps trivialize section 1341 by enabling individual Indians to avoid section 1341's bar simply by having their tribe bring a "representative" action on their behalf. *See Assiniboine & Sioux Tribes*, 568 F.Supp. at 277. Moreover, the Supreme Court noted in *Moe* that if standing to bring an action challenging the imposition of state taxes is based exclusively upon the rights of individual tribal members, those tribal members must be

The Tribe brought this action in its capacity as an incorporated business entity under section 17 of the Indian Reorganization Act (IRA), 25 U.S.C. § 477 (1982):[17] its standing to challenge Arizona's taxes is based on the tax burden it incurred while operating in a proprietary capacity. *See Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 468 n.7 (1976) (focussing on basis of tribe's standing to challenge particular state taxes); *see also Assiniboine & Sioux Tribes,* 568 F.Supp. at 276-77. The Tribe's first amended complaint states that "[t]he forestry operations of the tribe are run by the Fort Apache Timber Company [FATCO], a wholly owned business of the White Mountain Apache Tribe. . . . The lumbering operation is *the Tribe's principal industrial activity* and provides a substantial portion of the revenue and employment for the tribe and its members." FATCO has contractual agreements with six logging companies, including Pinetop, under which the companies fell trees, cut them to specified size, and transport them to FATCO's sawmill for a contractually-specified fee. When Arizona assessed taxes on Pinetop for its use of roads

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16 Cont.
authorized to invoke the jurisdiction of the federal courts in their own right. *See Moe,* 425 U.S. at 468 n.7 (citing *Zahn v. International Paper Co.,* 414 U.S. 291, 294 (1973)).

17 Section 17 of the IRA authorizes Indians to request the Secretary of the Interior to issue charters of incorporation to their tribes once the tribes have adopted constitutions and bylaws and organized tribal governments under section 16 of the IRA, 25 U.S.C. § 476 (1982). Congress enacted section 17 specifically "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones,* 411 U.S., 145, 152 (1973) (quoting H.R.Rep. No. 1804, 73rd Cong., 2d Sess. 1 (1934)). It sought to promote the organization of tribal business enterprises and to enable those enterprises "to enter the white world on a footing of equal competition." 78 Cong. Rec. 11732 (1934); *accord Mescalero Apache Tribe,* 411 U.S. at 157 (quoting above passage from Congressional Record).

17 Cont.

The Supreme Court and other courts have recognized a distinction between tribes acting as business entities pursuant to IRA section 17 and as sovereign, governmental entities pursuant to section 16, and have consistently indicated that the capacity in which a tribe is acting helps to determine its legal rights, privileges, and immunities. *See Kerr-McGee Corp. v. Navajo Tribe of Indians,* 105 S.Ct. 1900, 1903 (1985) (distinguishing between tribe's "role as commercial partner" and its "role as sovereign"); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 145-47 (1982) (noting same distinction in determining that tribe was entitled to impose taxes in its sovereign capacity upon parties with whom it had lease agreements); *Ramey Construction Co. v. Apache Tribe,* 673 F.2d 315, 320 (10th Cir. 1982) (tribe's "constitutional and corporate entities [are] separate and distinct" and may differ in the extent to which they possess tribal sovereign immunity); *Parker Drilling Co. v. Metlakatla Indian Community,* 451 F.Supp. 1127, 1131-35 (D.Alaska 1978); *Atkinson v. Haldane,* 569 P.2d 151, 174-75 (Alaska 1977); *Request for Interpretative Opinion on the Separability of Tribal Organizations Organized Under Section 16 and 17 of the Indian Reorganization Act,* 65 I.D. 483, 484 (1958) (Solicitor's report analyzing IRA's legislative history and concluding that "the powers, privileges and responsibilities of [section 16 and 17] tribal organizations materially differ"). In analyzing the IRA's legislative history and the differences between tribes acting in their section 16 and section 17 capacities, the Solicitor concluded that:

> The purpose of Congress in enacting section 16 of the Indian Reorganization Act was to facilitate and to stabilize the tribal organization of Indians residing on the same reservation, for their common welfare. It provided their political organization. The purpose of Congress in enacting section 17 of the Indian Reorganization Act was to empower the Secretary to issue a charter of business incorporation to such tribes to enable them to conduct business through this modern device, which charter cannot be revoked or surrendered except by act of Congress. This corporation, although composed of the same members as the political body, is to be a separate entity, and thus more capable of obtaining credit and otherwise expediting the business of the tribe, while removing the possibility of federal liability for activities of that nature. As a result, *the powers, privileges and responsibilities of these tribal organziations materially differ.*

65 I.D. at 484 (emphasis added).

within the White Mountain Apache Reservation, the Tribe had to agree to reimburse Pinetop for any tax liability it incurred, in order to avoid losing Pinetop's services. *Bracker*, 448 U.S. at 139-40 & n.7. The Tribe's interest in challenging the Arizona taxes arises, therefore, not out of its capacity as a sovereign, but out of its involvement as a joint venturer with private companies in logging operations.[18]

Since the Tribe is acting as a business corporation, it qualifies as a "citizen or other person" entitled to bring an action under section 1983 to enforce its rights under the Indian timber laws and the due process and equal protection clauses. Our court and other courts have held that private corporations qualify as "citizens" or "other persons" entitled to bring section 1983 actions. *See California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 283 (9th Cir. 1974) (corporations can bring section 1983 actions to vindicate their due process rights); *Des Vergnes v. Seekonk Water District*, 601 F.2d 9, 16 (1st Cir. 1979) (corporations are "persons" under section 1983 entitled to bring actions to vindicate their equal protection rights); *Advocates for the Arts v. Thomson*, 532 F.2d 792, 794 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976); *see also Metropolitan Life Insurance*, 105 S.Ct. at 1683 n.9 ("It is well established that a corporation is a "person" within the meaning

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[18] The Supreme Court has suggested that to determine whether a tribe has acted in its business or its sovereign capacity, courts must look beyond the formalities of whether the tribe has actually incorporated itself under section 17, and must look instead to the substance of the conduct in question and the powers actually granted to the tribe in its constitution and bylaws. *See Mescalero Apache Tribe*, 411 U.S. at 157-58 & n.13; *see also Atkinson*, 569 P.2d at 171. *But cf. S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376, 1382 (Ariz. Ct. App. 1983) (citing 1958 Department of Interior opinion and focussing on formalities of whether tribal corporation had separate officers and directors, bank accounts, assets, and property holdings from the tribe's section 16 governmental entity).

of the Fourteenth Amendment."); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) (corporation is a "person" under the equal protection and due process clauses). In enacting the IRA, Congress intended to enable tribal business enterprises "to enter the white world on a footing of equal competition." 78 Cong. Rec. 11732 (1934); *accord Mescalero Apache Tribe*, 411 U.S. at 157. It presumably did not intend them to be saddled with any legal disabilities greater than those of other private corporations solely because they are affiliated with sovereign tribal governments, but expected instead that private and tribal corporations would be treated identically.[19] Therefore, since a private corporation would be entitled to challenge Arizona's vehicle taxes in a section 1983 action, the Tribe acting as a business corporation is entitled to bring such an action as well.

I also conclude that the Tribe's action is not barred by section 1341, because it qualifies for the "Indian tribes" exception to that provision. The Supreme Court ruled in *Moe* that if an action challenging the imposition of state taxes can be brought under the "Indian tribes" jurisdictional provision, 28 U.S.C. § 1362 (1982), it automatically qualifies for the "Indian tribes" exception to section 1341. *See Moe*, 425 U.S. at 472-75. Based upon the plain language and legislative history of section 1362, and our prior cases interpreting that provision, I conclude that the Tribe is entitled to bring the present action under section 1362, and therefore is not barred by section 1341 from bringing it in federal court.

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[19] For example, Congress intended that tribal business corporations would be able to enter into contracts waiving any possible sovereign immunity from unconsented suits. *Parker Drilling*, 451 F.Supp. at 1131; *Atkinson*, 569 P.2d at 174-75. If tribal corporations did not have such a capacity, they would be at a distinct disadvantage vis-a-vis other corporations, because private parties would be discouraged from entering into contractual agreements with them.

The plain language of section 1362 authorizes actions "*brought by any Indian tribe or band* with a governing body duly recognized by the Secretary of the Interior":[20] it does not distinguish between the "governmental" tribe provided for in IRA section 16 and the "incorporated tribe" provided for in section 17. 28 U.S.C. § 1362 (emphasis added); 25 U.S.C. §§ 476-477. Moreover, nothing in section 1362's legislative history indicates that it was intended to apply only to tribes acting in a sovereign or governmental capacity. *See* H.R. Rep. No. 2040, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. Code Cong. & Ad. News 3145, 3146-47. When Congress passed section 1362 in 1966, it was fully aware that Indian tribes can act in both sovereign and proprietary capacities. Therefore, its failure to limit explicitly the scope of section 1362 to actions brought by tribes in their governmental capacity suggests that it intended the provision to encompass actions brought by tribes in their corporate capacity as well. Furthermore, this court has held that "statutes passed for the benefit of Indian tribes, *such as section 1362*, are to be liberally construed, with doubtful expressions being resolved in the Indians' favor." *Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 712 (9th Cir. 1980) (citations omitted and emphasis added), *cert. denied*, 451 U.S. 911 (1981).

This circuit's decision in *Navajo Tribal Utility Authority v. Arizona Department of Revenue*, 608 F.2d 1228 (9th Cir. 1979), also indicates that the Tribe's action is not barred under section 1341. In that case, we held that a utility company

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[20] The reference to a "duly recognized" governing body in section 1362 merely indicates that the Tribe must have an IRA government organized under IRA section 16. Since tribes can become incorporated under IRA section 17 only if they already have a section 16 government, this reference to section 16 does not mean that Congress intended section 1362 to apply only to tribes acting in a sovereign or governmental capacity.

that was loosely affiliated with the Navajo Tribe could not bring an action as an "Indian tribe or band" under section 1362, since the utility company was semi-autonomous, three of its seven directors were not members of the Tribe, and the Tribe itself was "not a party" to the action. *Id.* at 1231-32. Although we held that Congress had not intended section 1362 to "provide access to federal courts for subordinate, semi-autonomous entities of Indian tribes and bands," we concluded that:

> *If the leadership of a tribe or band decides that litigation is necessary to protect the rights of the tribe or band, then section 1362 will provide federal court access to the tribe or band when the other jurisdictional requirements of that section are also met.*

Id. at 1232 (emphasis added). We also indicated that "[t]o the extent that [the utility's] interests are identified with the Tribe's, the Tribe itself will be able to protect those interests, should its leadership decide to do so," *Id.* at 1233 (citing *Mescalero Apache Tribe*, 411 U.S. at 157 n.13) (emphasis in original).[21]

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[21] *Navajo Tribal Utility* contains dictum stating that "[s]uits brought by tribal corporations have also been found to fall outside the scope of section 1362." 608 F.2d at 1231. The court cites *Cape Fox Corp. v. United States*, 456 F.Supp. 784, 798 (D.Alaska 1978), *rev'd on other grounds*, 646 F.2d 399 (9th Cir. 1981), and two other cases for that proposition. However, *Cape Fox* is inapposite. It involved "a Native corporation organized under the Alaska Native Claims Settlement Act," *id.* at 797, and thus did not even involve a tribe or band eligible to bring an action under section 1362. *See id.* at 797-98. The other cases are conclusory in their analysis, and do not provide any basis for deciding that the Tribe was not eligible to bring a section 1362 action in this case. *See United States v. State Tax Commission*, 505 F.2d 633, 638 (5th Cir. 1974); *Dodge v. First Wisconsin Trust Co.*, 394 F.Supp. 1124, 1127 (E.D. Wis. 1975).

In the present action, the Tribe has followed the precise guidelines suggested in *Navajo Tribal Utility*. The Tribe has brought the action in its own name on behalf of a tribal enterprise that it totally controls. There is nothing in the record to suggest that FATCO is semi-autonomous, or that its interests diverge from the Tribe's in any way. Thus, the Tribe's action can be brought in federal court under section 1362 and qualifies under the "Indian tribes" exception to section 1341.

Since I conclude that the Tribe was entitled to bring its present section 1983 action in federal court, that its claims based on the Indian reservation timber laws are meritorious, and that its due process and equal protection claims are not "frivolous" under the definition provided in *Hagans v. Lavine*, I would affirm the district court's award of attorney's fees to the Tribe.